REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Suit 385 of 2012

JULIUS MAINA KINOKO...……....PLAINTIFF

VERSUS

HEZEKIAH NDINGURI NJENGA T/A TABBY SERVICES…….....DEFENDANT

RULING

By an amended Notice of Motion dated 21st September 2012 and filed in court on the same day expressed to be brought under the provisions of Order 40 rules 1, 2 and 4; Order 51 of the Civil Procedure Rules, 2010, Section 3 & 3A of the Civil Procedure Act and All Other Enabling Provisions of the Law, the Plaintiff/Applicant seeks for the purposes of this ruling a temporary injunction restraining the defendant from withdrawing from the account known as Tabby Services Account No. 01109393642700 at Co-operative Bank of Kenya Limited Tom Mboya, Street Branch (hereinafter known as the account) or any other account of Tabby Services (hereinafter referred to as the firm) otherwise in accordance with the partnership agreement dated 3rd July 2011 pending this suit; a temporary injunction compelling the defendant/respondent from denying the applicant access and participation to the business operations and financial records pending the hearing of the suit; a temporary injunction compelling the respondent to enjoin (sic) the applicant as a co-signatory of the account pending the hearing of the suit; an injunction compelling the respondent to forthwith redeposit the sum of Kshs 2.3 million or any other sum withdrawn from the account by the respondent by the defendant on or after 23rd August 2012 during the pendency of this suit; that all future payments due to the firm and in particular all payments from G4S Company Ltd be paid into the said account pending the hearing of the suit; that the Court be pleased to grant an order compelling the respondent to give an account of all moneys in the hands of the respondent on the account of the firm; that an order for the payment by the Defendant of all monies found to be due to the plaintiff on taking of such accounts in the proportion of their contribution to the firm's capital; and an order for provision for costs of the application.

The application is based on the grounds in the body of the application and is supported by an affidavit sworn by **Julius Maina Kinoko**, the plaintiff herein on 21st September 2012. According to the deponent, on or about 9th June 2008 the respondent registered the firm and thereafter opened a bank account for the firm at Co-operative Bank, Tom Mboya Branch being account No. 01109393642700 in the name of Tabby Services. As a result of the need to inject more trading capital with G4S (K) Ltd into the firm, the respondent invited the applicant and a memorandum of understanding was entered into dated 3rd July 2011 in which the applicant agreed to invest in the said firm. According to the said memorandum the applicant was admitted as a partner in the said firm with a 50% share with the result that the name of the firm was to be amended to include the plaintiff as a partner and the partnership was to operate on the basis of a trust. According to the deponent, the respondent was obligated at the applicant's request to render a true and full account of and apply the partnership's property exclusively for the purposes of the

firm in accordance with the partnership agreement. Accordingly a certificate of Registration of Change of particulars was issued on 17th October 2011 which particulars named the parties herein and their wives as partners in the said firm. Although from the date of the agreement only the applicants injected funds into the firm, the respondent the respondent has been reluctant to change the particulars of and include the applicant as a co-signatory to the firm's account in breach of the said agreement. Despite understanding that each party contributes equal funds to the firm the respondent was unable to do so. However in April 2012 the respondent's conduct changed and the applicant immediate change of the said bank account signatories but the respondent declined to do so and on 24th July 2012 the respondent intimated his intention to sell the business and closing the bank account. Apart from this the respondent has wrongfully failed and/or refused to allow the applicant and/or his agent to participate in the day to day operations of the firm. In the applicant's opinion, the respondent has wilfully and persistently breached the partnership agreement, and/or otherwise conducted himself in a manner that rendered it practically impracticable for the partnership business to be carried on with the other partners him and failed to render to the applicant any account of the firm. Despite an order issued herein on 23rd August 2012 restraining the respondent from withdrawing money from the said account, the same day the respondent proceeded to withdraw therefrom a sum of Kshs. 2.3 million. In the applicant's opinion, unless the said sum is deposited into the firm's account he will be greatly prejudiced and the substratum of this suit will be destroyed. Since there is some money due to the firm from G4S the applicant feels that it is only fair that the same be paid into the joint account pending resolution of this dispute. Accordingly the applicant feels that the circumstances of this case warrant the orders sought.

The respondent filed two replying affidavits sworn by him on 14th September 2012 and 8th October 2012. In the former he deposed that he started trading as Tabby Services in 2008 and that he also injected funds into the partnership and dedicated all his time and energy to the running of the business. According to him it is the applicant who is a permanent employee of Total Kenya has given an impression of being very busy and has never presented himself to facilitate the process of change of bank signatories or seriously pursue the matter and it was not until 5th July 2012 that the same were executed by him and he came to court before the same were presented to the bank. According to him he injected a sum of Kshs. 100,000.00 into the business while the applicant injected Kshs 50,000.00 on 6th October 2012. According to him he has worked with the applicant's family members and has never breached any rules of the partnership as alleged and averred that any withdrawals were done in agreement with the applicant and the applicant's intention is merely to spoil the respondent's business relationship with the suppliers and had to look for funds elsewhere to trade with G4S after the applicant declined and instead advised G4S not pay the respondent. In the respondent's view, it has become impossible to do business jointly and it would be advisable to divide the money equally after payment of the original owners of the business the consideration. With respect to the affidavit sworn on 8th October 2012, the respondent contends that prior to the institution of this suit, the parties had expressed intentions to wind up the business pursuant to which the respondent being the sole bank account signatory worked on the accounts and prepared a cheque in favour of the applicant based on his shares. Therefore, the applicant contends, the order for re-banking would retrogressive and would be unsuitable save for the purpose of punishing him since unlike the applicant who is a manger with Total Kenya, he depends on the earnings from the firm to take care of his children and family expenses. According to him, the applicant who had recommended that the business with G4S which company he started working with before he even knew the applicant, cease now wants proceeds therefrom and his intention is therefore to ground the respondent, halt and malign the respondent's name since he is nolonger interested in the business. Despite reaching to the applicant to execute bank signatory forms the applicant has been reluctant and unable to agree to do so. According to him, he did not withdraw the money during the existence of the Court order since the same were vacated and despite that he did not withdraw the money but prepared a banker's cheque in favour of the applicant. Whereas he has no objection to account being operational for the purposes of splitting up whatever is in the account, he objects to the unpaid money by G4S being deposited therein since he worked for the same individually during the period the applicant kept off. According to him the sole aim of seeking these orders is to block his financial source rather than resolve the issue at hand at all.

The application was prosecuted by way of written submissions which were highlighted by the counsel for the parties. While reiterating the contents of the supporting affidavit, it is submitted on behalf of the

applicant that he has passed the test set in **Giella vs. Cassman Brown** since there is clear evidence that the respondent has solely dealt with the said account to the exclusion of the plaintiff in breach of the partnership agreement. The withdrawal of the funds on 23rd August 2012, it is contended was intended to defeat the court order and defraud the applicant. In the applicant's view, unless the orders sought are granted the entire suit will be rendered nugatory and the applicant will suffer irreparable loss. Since the respondent has deposed that he has no objection to the applicant being a signatory to the bank account, the mandatory orders compelling the respondent to make the applicant a signatory to the business account ought to be granted. Since it is admitted by the respondent that he solely withdrew money from the said account and prepared a banker's cheque in favour of the applicant, it is submitted that since all the partners were to be signatories to all transactions and as the withdrawal was done during the pendency of these proceedings and the court order, all monies should be preserved pending the resolution of the present dispute. It is further submitted that in the respondent's correspondence, he has expressed no objection to the banking of the sums received from G4S in the said account and hence the orders ought to be allowed and accounts be taken. On the authority of **Ol Kombo vs. County Council of Narok & Another (1991) KLR 560**, it is submitted that where there is a plain and uncontested breach of clear covenant not to do a particular thing and the covenantor promptly begins to do what he promised not to do, the issue of irreparable harm and balance of convenience does not arise and the covenantor, be restrained before trial. Relying on **Sherif Hassan vs. Nadhif Jama Adan Civil Appeal No. 121 of 2005** it is submitted that whereas mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, where it is prima facie established as per the standards spelt out in the law that a party against whom the mandatory injunction is sought is on the wrong, the courts have taken action to ensure that justice is meted out without the need to wait for full hearing of the entire case. Based on **Kamau Mucuha vs. The Ripples Limited Civil Application No. Nai 186 of 1992**, the applicant submits that it is clear on authority and principle that there is jurisdiction to grant a mandatory injunction in an appropriate case.

On the part of the respondent it is submitted that injunction being an equitable remedy he who comes to equity must come with clean hands. Despite the agreement by the respondent on the division of the property business in the existing finances, the applicant has shown an unusual reluctance instead urging the court to have the money banked and that he be made a signatory before division is discussed. The applicant's intention of doing so is to punish the respondent since the applicant is on a salaried job with Total Kenya Limited. In the respondent's view the orders freezing the account were vacated as they were affecting the business entity without effecting service thereof. It was after the said decline that the respondent effected the said withdrawal while taking into account the applicant's interests by drawing a banker's cheque in favour of the applicant. Even prior to the institution of this suit, it is submitted that the parties had agreed to wind up the joint business. While reiterating the contents of the replying affidavits, it is submitted that the Court ought to deal with only issues which cannot be resolved by arbitration. In the respondent's view since the parties have shown an intention to go their separate ways the Court ought not to force them to stick together more so when the applicant has not even stated how much ought to be paid to him. As the sum of Kshs 2.3 million withdrawn from the account was withdrawn when the Court refused to extend the freezing of the account there is no good reason for ordering the re-banking of the said sum especially when the respondent has made out cheques in favour of the applicant and has used part thereof in boosting his business. In his view, in the circumstances of this case the grant of mandatory injunction is unwarranted. There are other factual issues raised in the submissions which I have decided to ignore since they are not contained in the affidavits and submissions ought not to be turned into avenue for adducing evidence.

The principles guiding the grant of interlocutory injunctions are firstly, an applicant must show *a prima facie* case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience. See **Giella vs. Cassman Brown & Co. Ltd [1973] EA 358.**

However, the conditions enumerated above are not the only conditions for consideration by the court. It is now well recognised that in exercising its discretion under the Civil Procedure Act or in determining whether or not to grant the injunction sought the Court is enjoined to consider what has become known as

the principle of proportionality under the overriding objective which objective the Court is enjoined to give effect to in the exercise of its powers under the Act or the interpretation of any of its provisions. In **Suleiman vs. Amboseli Resort Limited [2004] 2 KLR 589 Ojwang, AJ** (as he then was) expressed himself as follows:

"It is the business of the court, so far as possible, to secure that any transitional motions before the Court do not render nugatory that ultimate end of justice…The argument that the law governing the grant of injunctive relief is cast in stone is not correct, for the law has always kept growing to greater levels of refinement, as it expands, to cover new situations not exactly foreseen before. Traditionally, on the basis of the well-accepted principles, the Court has had to consider the following questions before granting injunctive relief: (i) is there a prima facie case with a probability of success? (ii) does the applicant stand to suffer irreparable harm, if relief is denied? (iii) on which side does the balance of convenience lie? Even as those must remain the basic tests, it is worth adopting a further, albeit rather special and more intrinsic test which is now in the nature of general principle. The Court, in responding to prayers for interlocutory injunctive relief, should always opt for the lower rather than the higher risk of injustice…Although the court is unable at this stage to say that the applicant has a prima facie case with a probability of success, the Court is quite convinced that it will cause the applicant irreparable harm if his prayers for injunctive relief are not granted; and in these circumstances, the balance of convenience lies in favour of the applicant rather than the respondent. There would be a much larger risk of injustice if the court found in favour of the defendant, than if it determined this application in favour of the applicant".

In an interlocutory application, it must be emphasised, the Court is not required to make any conclusive or definitive findings of fact or law, most certainly not on the basis of contradictory affidavit evidence or disputed propositions of law. It is, nevertheless, not excluded from expressing a *prima facie* view of the matter and is entitled to consider what else the deponent to the supporting affidavit has stated on oath which is not true

In the case of **Mrao Ltd vs. First American Bank of Kenya Ltd & 2 Others [2003] KLR 125** the Court of Appeal held as follows:

"in civil cases a *prima facie* case is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party to call for an explanation or rebuttal from the latter. A *prima facie* case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly a standard, which is higher than an arguable case".

In this case both parties seem clear in their minds that the partnership entered into by themselves has reached a point where the same cannot be salvaged. The relationship just like in any other partnership was largely based on trust. Trust, it has been said, is like virginity and once lost cannot be recovered. The only way forward is for the parties to sit down take accounts and decide what is due to the other and go their separate ways. It is, however, not in doubt that it is the respondent who was the sole signatory to the bank account. In order for a proper account to be taken, it would be necessary that the proceeds of the partnership be preserved in order to determine what is truly and justly due to each of the partners. In **Watts vs. Nduati (Hck) [1993] KLR 515 Wambilyangah, J** held that whereas the granting of an injunction is an exercise of the Court's discretion, it is settled that the discretion has to be exercised within the ambit of the principles which were enunciated in the case of ***Giella vs. Cassman Brown & Co. [1973] EA 358.*** The learned Judge went on to state that when a situation emerges where one partner seeks to impose his wishes or unilateral decision affecting any aspect of the partnership business on the other partner then the partnership will have failed and stands to be dissolved. Until such partnership is dissolved the interest of each of the parties is protected best when the status quo is maintained; otherwise it will be tantamount to allowing one partner to betray the fundamental principles governing the partnership.

Since the issue of the existence of the partnership is not disputed as well as the fact that the respondent was the sole signatory to the account taken together with the contents of the letter dated 23rd August 2012

in which the respondent attempted to divert the proceeds from G4S to another account I have no doubt in finding that the applicant has established a prima facie case with probability of success.

With respect to the second condition that the applicant must prove that he stands to suffer irreparable loss unless the injunction sought is granted, the respondent has maintained that the firm is the only business himself and his family relies on. If that is true it is clear that in the event that the subject of this suit is not preserved, from the respondent's own evidence, chances that the applicant may be left baby-sitting a barren decree at the end of the trial cannot be ruled out. Accordingly I am satisfied that the applicant has fulfilled the second condition. In the result weighing the interest of the applicant and the respondent I find that there would be a much larger risk of injustice if the court found in favour of the respondent, than if it determined this application in favour of the applicant and taking into account the twin overriding principles of proportionality and equality of arms which are aimed at placing the parties before the Court on equal footing, I find merit in the prohibitory/restraining orders sought in the amended Notice of Motion dated 21st September 2012. I accordingly have no hesitation in granting orders of temporary injunction restraining the defendant from withdrawing from the account known as Tabby Services Account No. 01109393642700 at Co-operative Bank of Kenya Limited Tom Mboya, Street Branch (hereinafter known as the account) or any other account of Tabby Services otherwise in accordance with the partnership agreement dated 3rd July 2011 pending this suit.

The other prayers sought are in my view mandatory injunctions. With respect to the prayer for a temporary injunction compelling the defendant/respondent from denying the applicant access and participation to the business operations and financial records pending the hearing of the suit and a temporary injunction compelling the respondent to join the applicant as a co-signatory of the account pending the hearing of the suit there does not seem to be any serious dispute over that. Accordingly that prayer is granted.

On the prayer for an injunction compelling the respondent to forthwith redeposit the sum of Kshs 2.3 million or any other sum withdrawn from the account by the respondent by the defendant on or after 23rd August 2012 during the pendency of this suit, it is the respondent's contention that the same was withdrawn when the orders granted herein had been vacated. From the record, it is clear that on 15th August 2012, **Hon. Lady Justice Ang'awa** declined to extend the ex parte orders that had been granted herein. However on 23rd August 2012, **Hon Lady Justice Mumbi Ngugi** granted prayer (2) of the application dated 17th August 2012 whose effect were the same as the orders which **Ang'awa, J** declined to extend. It is not disputed that the same day the respondent withdrew the said sum from the said account. At what point in time the said sum was withdrawn cannot be curtained based on the material before me taking into account the fact that the orders granted by **Mumbi Ngugi, J** were granted *ex parte*. I cannot therefore ascertain at this stage whether the respondent was aware of the existence of the latter orders when he withdrew the said sum of money. In the premises I am unable to grant the orders of injunction an injunction compelling the respondent to forthwith redeposit the sum of Kshs 2.3 million or any other sum withdrawn from the account by the respondent by the defendant on or after 23rd August 2012 during the pendency of this suit. Courts when granting injunctive orders must grant orders which are specific and certain which if disobeyed the court would be able to compel compliance with. To ask the Court to compel the redeposit of an unknown sum withdrawn after 23rd August 2012, if any sum was actually withdrawn thereafter would amount to granting speculative orders and Court orders ought not to be speculative when what are sought are mandatory as opposed to prohibitory orders.

With respect to the prayer that all future payments due to the firm and in particular all payments from G4S Company Ltd be paid into the said account pending the hearing of the suit, the respondent contends that that order ought not to be granted since the proceeds from G4S were as a result of his own industry. That may be so, however as long as the proceeds therefrom were due to the partnership funds which is under dispute, the respondent cannot as of now decide what sum is to deposited into the account and which sum ought not. In order to preserve the subject of the dispute, the prayer is accordingly granted.

As for the prayers that the Court be pleased to grant an order compelling the respondent to give an account of all moneys in the hands of the respondent on the account of the firm, Order 20 rule 1 of the

Civil Procedure Rules provides:

Where a plaint prays for an account, or where the relief sought or the plaint involves the taking of an account, if the defendant either fails to appear or does not after appearance by affidavit or otherwise satisfy the court that there is some preliminary question to be tried, an order for the proper accounts with all necessary inquiries and directions usual in similar cases shall forthwith be made.

From the material on the record, there is no serious dispute with respect to the taking of the account. Accordingly, I direct the respondent to file and a serve a copy of the statement of account of all moneys in the hands of the respondent on the account of the firm to the applicant within Fifteen (15) days from the date hereof.

In light of the orders granted hereinabove to grant an order for the payment by the Defendant of all monies found to be due to the plaintiff on taking of such accounts in the proportion of their contribution to the firm's capital would inherently contradict the orders already granted hereinabove. However each party is at liberty to apply.

The costs of this application will be in the cause.

Dated at Nairobi this 14th day of December 2012

G V ODUNGA
JUDGE
In the absence of the parties