



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Case 465 of 2011

DANISH ORGNAISATION FOR SUSTAINABLE ENERGY.....

.....PLAINTIFF

-VERSUS-

KENYA ORGANISATION FOR ENVIRONMENTAL EDUCATION.....

.....DEFENDANT

AND

**NON-GOVERNMENTAL ORGANIZATIONS CO-ORDINATION
BOARD.....INTERESTED PARTY**

R U L I N G

1. This is a Ruling on the Notice of Motion application dated **31st May 2011** and filed in Court on **18th October 2011**. It is brought under **Order 40 Rules 1 (a) (b) 2, 3, 4 and 11, Order 51 Rules 1 and 3** of the **Civil Procedure Rules** and **Sections 3, 3A and 63 (c) & (e)** of the **Civil Procedure Act**. The Application seeks the following orders, namely:-

1) Spent

2) Spent

3) Spent

4) That pending the hearing and determination of this application, *inter partes*, the hearing and determination of the suit and or/until further orders:-

a) The Defendant through its officers, agents and/or servants be compelled by an order of mandatory injunction to release and hand-over to the plaintiff and/or its appointed agents and representatives all the assets and equipment comprising of project UtSS Assets as set out and described in order 2 (a) to (w) of the application.

b) The Defendant through its officers, agents and/or servants be compelled by an order of mandatory injunction to release and hand-over to the plaintiff and/or its appointed agents and representatives all the assets and equipment comprising of Project SECODE 2 Assets as set out and described in order 3 (a) to (x) in the application.

5) That pending the hearing and determination of this suit and/or until further orders, the defendant whether by itself, agents, servants or by any other persons whomsoever be restrained by

an order of injunction from using, wasting, offering for sale, selling, transferring, disposing and/or otherwise parting with the possession of all assets and equipment comprising of Project UtSS Assets set out and described in order 2 (a) to (w) of the application.

6) That Pending the hearing and determination of this suit and/or until further orders, the Defendant whether by itself, agents, servants or by any other persons whomsoever be restrained by an order of injunction from using, wasting, offering for sale, selling, transferring, disposing and/or otherwise parting with the possession of Project Secode 2 Assets set out and described in order 3 (a) to (x) of the application.

2. The application is premised on the grounds stated on the face of the application and is supported by the affidavit of **ERICK JUNGE MADSEN** sworn on **31st May 2011** as well as a Further affidavit by the same person sworn on **15th February 2012**.

3. The application is opposed by the defendant vide the Replying Affidavit of **DORCAS OTIENO**, the Defendant's executive director, sworn on **14th December 2011**.

4. The Plaintiff and the defendant entered into two separate agreements on 28th February, 2009 and 19th November, 2009, whereby the Plaintiff granted funds to the defendant for implementation of two community projects known as Sustainable Environment and Community Development in Kisumu City (Project Secode 2) and under the Same Sky-schools for sustainable development (Project UtSS) respectively. The funds granted to the Defendant were utilized in acquisition of various assets and equipment, as set out in the application, that is, towards implementation of the said Projects.

5. It is averred by the Plaintiff that the agreements in respect of the said projects were substantially similar in material respects. The provisions of the agreements are stated under paragraph 12 (a) to (i) of the supporting affidavit among them that the Defendant would keep an inventory of equipment and fixed assets purchased by funds disbursed and would surrender such equipment and assets to the Plaintiff and sign the requisite transfer documents at the determination of the contract.

6. It is further averred that, in or around September, 2010, the Plaintiff in exercise of its rights under the contracts, commissioned the Audit firm of PKF Consulting, Kenya, to undertake forensic investigative audits into the Defendant's financial transactions involving the funds disbursed under the Projects. In the course of undertaking forensic investigative audit serious irregularities in the administration of the funds disbursed under the projects came to light, which irregularities amounted to breach of the agreements. With a view to allowing the defendant to take corrective measures, the Parties signed a Memorandum of understanding (MOU) on 10th November, 2010 and agreed on the course of action to be taken by the defendant. The MOU provided that the Plaintiff would be at liberty to terminate the respective agreements if the remedial action agreed upon therein was not taken within the stipulated timelines. The Plaintiff claims that they terminated the agreements in respect of Project UtSS and Project Secode 2 by its notice in writing dated 19th January 2011 owing to the various acts of breach by the Defendant and its failure to take remedial measures agreed upon in the MOU within the stipulated time or at all. The various acts of breach include diversion and use of the granted funds to finance unrelated activities, irregularities in the implementation of the projects and failure on the part of the Defendant to put in place an accountable and transparent system that would safeguard proper and efficient administration of the funds in the implementation of the projects.

7. It is averred by the Plaintiff that each of the agreements aforesaid provided that all such assets and equipment acquired for use in the implementation of the projects belonged to the Plaintiff and that upon conclusion of the projects, the Defendant would transfer and deliver the same to the plaintiff. In addition, it is stated by the Plaintiff that the Defendant through its executive director, by a letter dated 22nd January 2011 acknowledged termination of the contracts and directed its staff to hand over the equipment and assets in their possession for consequential delivery and return to the plaintiff through its appointed agent, PKF. According to the plaintiff, the defendant held the assets and equipment on trust basis for the Plaintiff and could not lawfully use the same for purposes other than for the implementation of the

Projects. Therefore, any such rights and interests that the Defendant had in the said assets and equipment were extinguished upon cancellation of the agreements.

8. It is the Plaintiff's case that subsequent to the cancellation of the agreements, the defendant has refused to deliver up and release the assets and equipment to the plaintiff and failed to heed to numerous requests and demands in that regard made by the Plaintiff. The Plaintiff contends that the continued use of the assets by the Defendant is unlawful, amounts to trespass and the same is in violation of the provisions of the respective agreements. It is further the Plaintiff's contention that on account of the defendant's unjustified and unlawful refusal to release the projects' assets and equipment, the operations of the plaintiff have been severely crippled thereby compromising and putting to risk the Plaintiff's ability to secure further financing from Danish International Development Agency (DANIDA).

9. The application is fervently opposed by the defendant vide its replying affidavit. It is deponed on behalf of the defendant that the assets referred to by the Plaintiff were purchased with cash donations issued to the defendant pursuant to the agreements and the NGO Board Rules require the same to be registered in the Defendant's name and to be held on behalf of beneficiaries for as long as the Defendant is in existence. Therefore, according to the defendant, the assets are legally in its custody and it's their contention that a demand for the return of the same or a refund of donations to the Defendant is unlawful under the Kenyan Laws.

10. It is averred that at all times, the Board of Directors and the Executive Director made all efforts to meet the obligations under the contract between the parties herein and that they took reasonable steps to guard against corrupt and fraudulent activities, and cooperated with the plaintiff in examining internal processes to ensure activities were conducted in line with the Danida aid policies to the extent specified in the contract between the parties and in accordance with the Kenyan laws.

11. The defendant contends that the Plaintiff purported to illegally terminate the agreements between the Parties alleging breach of contract by the defendant. It is the Defendant's case that they are not guilty of any wrong as the matters complained of were wholly caused by or substantially contributed to by the conduct of the Plaintiff. It is averred that the plaintiff's officers were intent on frustrating the Executive Director's effort to work at the Defendant's offices and the Plaintiff made all efforts to limit the involvement of the Executive Director and the Defendant's Board in running the projects. It is also averred that the plaintiff's officers interfered with the position the employees in the Defendant's organization held.

12. It is further averred by the defendant that the plaintiff was aware at all times the manner in which the defendant expended the amounts disbursed to it as donations, owing to the close interactions of the plaintiff's officers with the defendant's Finance and administration Manager and the Defendant's project manager. Following a Board meeting convened by the defendant to discuss the financial management of the defendant, the defendant decided to suspend the finance and administration manager and the programs officer owing to their conduct in handling the defendant's affairs which was found wanting. However, the defendant claims that the plaintiff's officers were quick to oppose the move and were most emphatic that the said employees be reinstated. It is the defendant's case that this was an act of sabotage by the plaintiff as the defendant had unearthed professional misconduct on the part of the finance and administration manager but the plaintiff's officers intervened on his behalf.

13. The defendant avers that they were not in full agreement with the audit report prepared by the plaintiff's investigators, but they could not protest much owing to the fact that the plaintiff was in control of the funds donated by the principal donors. It is also averred that the Defendant met all the terms and conditions specified in the said Memorandum of Understanding save on the matters touching on the finances of the Defendant's organization, which the plaintiff should not hold the defendant responsible as it interfered with the defendant's efforts to meet its obligations by insisting that the defendant retains the services of a deviant employee. The defendant maintains that the termination of the contract between the parties by the plaintiff was premature, unwarranted and actuated by fraud and malice, as the plaintiff terminated the said contract before receiving a final report from its auditors.

14. It is also alleged that the defendant's employees have refused to return the defendant's equipment and commenced employment in various capacities for the defendant's partner, Umande Trust, working with the Plaintiff to implement the Defendant's projects. It is finally the defendant's case that the Plaintiff's application for injunction and recovery of the defendant's assets is not intended for the benefit of the poor people and less privileged but for illegal purposes. According to the defendant, the plaintiff has filed this suit to frustrate the defendant after it was prohibited from using the defendant's licenses and permits by the relevant authorities.

15. The Plaintiff filed a further affidavit in response to the defendant's replying affidavit. In the said affidavit, it is deponed that the matters relating to the grant, administration and accountability for the funds released by the Plaintiff to the defendant for the implementation of the projects were of contractual nature and were subject to and governed by the respective contracts signed by the parties and neither the regulations nor the Non-Governmental Organizations Coordination Regulations prohibit return thereof to the plaintiff.

16. The allegations that the Plaintiff undermined the Defendant's officers' authority and interfered in the administration and implementation of the projects are unsubstantiated and without any basis, and that the Defendant's participation in the projects being well within the agreements and Procedure manuals agreed upon by the parties.

17. This Court granted leave to the defendant to cross-examine Mr. Erick Junge Madsen, the international Projects Coordinator on the Contents of the Further Affidavit which was done on 29th May 2012. On cross examination, Mr. Erick confirmed that the funds as disbursed by them were a grant and not a donation. He further confirmed that the plaintiff was now co-operating with Umande Trust and that some people working for umande were former employees of the defendant company.

18. The parties herein filed written submissions as well as the interested party.

19. I have considered all the affidavits as filed by the parties, and the submissions made.

20. The conditions for granting an interim order of injunction are well settled in the celebrated case of **Giella V Cassman Brown Ltd**. In this case, the plaintiff is also seeking for a mandatory order of injunction which is granted in very clear cases because it is tantamount to entering a judgment without giving the defendant a chance to be heard on their defence and subsequently disposing off the suit. The principles to be considered by this court with regard to mandatory injunction were set out by the Court of Appeal in **Shariff Abdi Hassan vs Nadhif Jama Adan [2006] eKLR** where at page 8 of its judgment, it stated as follows:

“The law as regards the principle to be applied when considering the two prayers is different from the principles set out in Giella's case for the standard of approach when considering whether or not to grant mandatory injunction is higher than in respect of prohibitory injunction. The case of LOCABAIL INTERNATIONAL FINANCE LTD V AGRO-EXPORT AND ANOTHER [1986] ALL ER 901 sets out the principles applicable in cases of mandatory injunction”. It states as follows;

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

21. The defendant's main contention is that the plaintiff is not entitled to a return of the assets and equipment as the same is forbidden under the Income Tax Laws of Kenya as well as the Non-Governmental Organizational rules. In its submissions the defendant referred to regulation 4 of the

Income Tax (Charitable Donations) Regulations which states thus:-

“4. For purposes of these regulations, donations made shall-

(a) be in cash and shall not be repayable or refundable to the donor under any circumstances;”

It is my considered view that the above section does not apply to the circumstances at hand. The section applies to donations made in cash and for purposes of taxation. In the present case, what is in issue are assets and equipment that were purchased using the funds disbursed to the defendant by the plaintiff.

22. The defendant acquired the assets, the subject matter of this suit, using the funds granted by the plaintiff towards implementation of the two projects. Therefore, the assets belonged to the projects and ideally should be returned to the plaintiff who disbursed funds for the purchase of the same for purposes of continuing the implementation of the projects. Strictly speaking, the defendant was a steward of the assets and equipment on behalf of the Plaintiff for the benefit of the beneficiaries. There is nothing whatsoever the defendant can show to attach itself ownership to the said assets and equipment. As it is, it does not seem to me that the defendant company is up and running to take care of the interests of the supposed beneficiaries. This is in relation to the problems it's facing currently including its employees moving to Umande Trust and some beneficiaries being hostile to it. The Executive director of the defendant has admitted that the beneficiaries have been hostile to him.

23. The defendant has not rebutted the allegations of breach against it. Instead it claims that the said breach was caused by the interference of the Plaintiff in its affairs. Therefore, it is not disputed that the defendant breached and contravened the provisions of the agreements. In the event, the plaintiff was justified to terminate the agreements and the same was therefore done legally. In view of the foregoing, I find that the plaintiff has established a *prima facie* case.

24. The plaintiff is also seeking for a mandatory injunction to compel the defendant to release and hand-over to the plaintiff all the assets and equipment comprising of project UtSS Assets and Project SECODE 2 Assets.

25. The Plaintiff contends that it was a provision of the agreements that all such assets and equipment acquired for use in the implementation of the projects belonged to the Plaintiff and that upon conclusion of the projects, the Defendant would transfer and deliver the same to the plaintiff. I have perused the agreements as entered into by the parties and I cannot see such an express provision. The Plaintiff in support of its claim relies on one of the clauses in the agreements which reads as follows:-

“to ensure that any donations at the end of the intervention are given through a formal transfer of property, documenting the transferred effects and their value.”

It is plain that nothing in this clause indicates that the said assets and equipment belonged to the plaintiff and that the same were to be transferred to the plaintiff at the conclusion of the project.

26. The plaintiff wants the same to be delivered to it so that they can continue with the projects through Umande Trust which they have partnered with. However, this Court cannot establish with certainty at this interlocutory stage that those assets are indeed to be used for continuation of the said projects in partnership with Umande Trust. The Plaintiff together with Umande trust need to give *viva voce* evidence to show that the assets are indeed to be used for the implementation of the two projects and to the interests of the beneficiaries. The Plaintiff also has to establish that the said Umande Trust or the Plaintiff itself has the capacity to continue with the implementation of the said projects.

27. The defendant as well as the interested party has also raised legal issues in regard to how assets should be transferred from a Non-governmental organization which has been deregistered. These legal issues can only be determined at the full hearing of this case.

28. From the foregoing, no special circumstances have been shown in this case to warrant

grant of a mandatory injunction.

29. In the upshot, the plaintiff's Notice of Motion dated **31st May 2011** and filed in Court on **18th October 2011** is allowed only in terms of prayers 5 and 6. The costs of this application shall be for the Plaintiff.

It is so ordered.

DATED, READ AND DELIVERED AT NAIROBI

THIS 7TH DAY OF DECEMBER 2012

E.K.O OGOLA
JUDGE

Present

Chege for Plaintiff/Applicant

Thuranira for Defendant

Teresia – court clerk