



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
MILIMANI COMMERCIAL & TAX DIVISION
CIVIL SUIT NO. 850 OF 2009

KINGS CASTLE LIMITEDPLAINTIFF

VERSUS

FAITH WATHIEGENI KAMWARO DEFENDANT

RULING

The Applicant in the Notice of Motion dated 29th October 2010 is the Defendant in the suit. She seeks orders of this court for the appointment of one Godfrey Muhoro Kamau as a manager, on for the appointment of one Godfrey Muhoro Kamau as a manager, on interim basis, either singly or jointly with another person as may be nominated by either Anne Twite (a director of the plaintiff) or the court, to manage the affairs of the Plaintiff Company, its business and property, pending the hearing and determination of the suit.

She prays that subsequent upon such appointment, the affairs, business and property of the plaintiff be committed into the manager(s) possession and custody and that the court be pleased to confer upon the manager(s) such powers as may be necessary for the lawful management of the plaintiff's affairs, business and property, particularly as relates to:-

- (a) The taking possession of, collection and getting into the property of the Plaintiff company and for that purpose, quarry, mine, cut and market for sale the stones so quarried, mined and cut pending the hearing and determination of this suit.**
- (b) The selling or otherwise disposal for gain of the said stones pending the hearing and determination of this suit;**
- (c) Effect and maintain security and insurances for the Plaintiff Company's premises, machinery and assets pending the hearing and determination of this suit.**
- (d) To pay, upon prior approval of the parties hereto or of this Honorable Court any salaries, wages, rents, charges or other outgoings in respect of the Plaintiff Company's business or property;**

But without any power to sell or otherwise dispose of the plaintiff's business or assets, save as may be ordered or sanctioned by the court.

The Applicant also prays that the manager(s) be ordered to file with the court audited and accurate

accounts of all proceeds realized from the business effective from the date of appointment until the date of the manager(s)' discharge. The accounts to be rendered either on a monthly basis or as the court may otherwise order, with the manager(s) being allowed to draw a reasonable monthly remuneration from the plaintiff Company for his/their service, the amount of which shall be negotiated and agreed upon within 14 days of the order of the court or determined by the court based on arguments, evidence or representations made by the parties before the court.

The application is premised mainly on the grounds that:-

- I. The directorship and shareholding of the Plaintiff Company herein is in dispute as between one, Anne Twite, at whose instance the suit herein has been filed in the name of the plaintiff, on the one hand, and the Defendant, on the other hand.**
- II. Certain persons claiming to be the *bona fide* directors or shareholders of the Plaintiff Company herein, including the said Anne Twite are not Kenyan citizens or residents but reside in the United Kingdom.**
- III. The Defendant herein intends to challenge the aforesaid alleged directorships and to that extent, she has already prepared and filed an application for leave to amend her pleadings accordingly;**
- IV. The effect of the present *status quo*, following the plaintiff's application for interim injunction, is that the plaintiff Company has ceased to carry on its business and operations while the said Company continues to attract and incur recurrent liabilities such as rents, security charges and unpaid remuneration for employees.**
- V. The Plaintiff Company is continuously losing the value of its lease in respect of LR NO. 25468, Thika because no quarrying, mining and cutting of stone is taking place while rents continue to accrue.**
- VI. The Plaintiff Company's main business, being the sale and marketing of stones quarried, mined and cut on its leasehold over of LP NO. 25468, Thika, has ground to a halt thereby diminishing the net worth of the Company and undermining its goodwill and future business prospects and exposing it to risk of distress for rent, execution, winding up or liquidation;**
- VII. The plaintiff is incurring loss and damage in the nature of lost business opportunities;**
- VIII. The Plaintiff Company's plant and machinery are going to waste and may become unserviceable. Also that they are depreciating without proper accounting and provisions being made for such depreciation.**
- IX. Despite being asked to do so, the said Anne Twite, purportedly acting on behalf of and under the guise of the plaintiff Company, has failed to concur with the Defendant on modalities to ensure the smooth and proper running of the Plaintiff Company pending the hearing and determination of the suit herein thus jeopardizing the very existence of the plaintiff Company that she claims to want to protect by this suit.**
- X. It is just and fair that pending the hearing and determination of the main suit, the Plaintiff Company be given the opportunity to carry on with its main object and business.**
- XI. This Honorable Court has jurisdiction to grant the orders sought herein.**

The application is supported by the Applicant's Supporting Affidavit sworn on 29th October 2010, in which she states she is a director and shareholder of the Plaintiff Company by virtue of the copy of the Registrar of Company's form **CR12** annexed to the Supporting Affidavit as **annexture "FWK-1"**. She depones to possible ill will on the part of director of the Plaintiff Ann Twite in the filing of the suit which,

inter alia, challenges the Defendant/Applicant's claim to directorship and/or shareholding in the plaintiff, while seeking orders to perpetually injunct the Defendant/applicant from selling, alienating or disposing of the machinery, plants and assets of the plaintiff and to permanently restrain her from interfering with the operating of the plaintiff and the Company's and its director's rights of access to the company's workshop and store quarry, situated at **LR. NO. 209/8929 Thika**.

The Applicant claims to be a lawful director of the Plaintiff company by virtue of holding 350 shares therein which she claims to have been issued to her by the company on the authority of Barry Norman Twite (co-founder of the company with the named Anne Twite) now deceased, 300 of which she claims to hold in trust for her child sirred by the deceased. She states that she has solely managed the day to day affairs of the Plaintiff from the time the deceased invited her to join the company in 2006, and denies any intention on her part to sell, alienate or dispose of the company's assets. She avers that she is zealous to protect the assets of the company and its business and operations, claiming that an injunction obtained by the deceased's co-partner and her daughters Rebecca Elizabeth Butt and Victoria Alice Sheath (as directors of the company) continues to expose the Plaintiff to "the danger of completely going out of business" occasioning irreparable loss and damage to the company, its directors and shareholders.

In paragraphs 17, 18, 19 and 20 of her Affidavit, the Applicant depones to what she considers to be the Plaintiff/Respondent's losses in regard to a lease entered into with a third party for quarrying and mining business, diminishing net worth, goodwill, business prospects and opportunities, which she attributes to the said restraining orders and the dispute between the Applicant on the one hand and Anne Twite, and her daughters on the other as regards the directorship and shareholding of the Plaintiff company. She claims that the stalemate, has led to the company to cease carrying out its business and operations, while its various liabilities in terms of rents, security charges and unpaid workers dues remain unmet.

The Applicants contention, which she shays is informed by legal advice obtained from her lawyers, is that in view of the temporary injunction, the Respondent and the surviving founder director are estopped from opposing the application for the issuance of orders aimed at "impartial and objective preservation of the business and assets of the company" pending the hearing and determination of the suit, which she believes can be achieved through the appointment of the manager(s), as is sought herein, in order to give the company the opportunity to carry on with its main object and business and to safeguard the interest of the parties.

The application is opposed on the strength of the Replying Affidavit sworn by Anne Twite (the deponent) on 18th November 2010 as a duly authorized representative of the Plaintiff being its director. She challenges the Applicant's claim to be a director of the Plaintiff on the basis of want of authenticity of the documents relied upon by the applicant to prove her directorship and ownership of 350 shares in the Plaintiff. The said documents are the subject of criminal investigations. The Respondent contends that the two certificates exhibited as proof that the Applicant holds 350 shares in the Plaintiff company are possible forgeries, particularly in the absence of any documentary evidence of change of directorship to include the Applicant as a third director in addition to the deceased founder director and the deponent, or to increase the initial subscriber shares from 100 to 450 (as to include the Applicant's 350 shares).

The deponent has exhibited documents to show that the Applicant was never a subscriber to the Memorandum and Articles of Association (**annexture "AT4"**) which was incorporated in March 2001 with the sole directorship of the deceased and the deponent (each with 50 shares each). She depones further that the applicant never contributed to the starting up of the company and its business, which, as demonstrated by appropriate documentation, was financed principally by proceeds of sale of the deceased directors' parents' house and a bank loan secured by a mortgage over the founder directors' matrimonial home in England.

It is further contended in the Replying Affidavit that the deponent, having all along been a director of the Plaintiff, knows of no legal changes in the constitution of the company to include the Applicant as a director/shareholder and none could have taken place without her involvement and approval. She has exhibited a marriage certificate to prove that herself and the deceased were in a monogamous marital union which left no room for the alleged marriage between the Applicant and the deceased who ought to

be deemed to have a mere mistress or concubine of the deceased, a relationship which did not confer upon her any legal rights over the company.

The deponent states that the Applicant was a mere administrative staff at the company and that it would have been quite inconceivable that she and the deceased would issue the applicant with 350 shares in the company thereby reducing them to minority shareholders in the company, valued at approximately Kshs. 25 million.

The Respondent reads *mala fides* in the intentions of the Applicant in bringing the present application, which the deponent believes is a scheme towards unjust enrichment, given the fact that the Applicant was in the company of the deceased director when he was killed in an ambush in which she herself was not harmed and that soon afterwards she forcibly moved into the Plaintiff's business to operate the same singly, leading to the application and obtaining, by the Respondent injunctive orders against the Applicant which, orders have been enforced against the Applicant by the imposition of a fine of Kshs.500,000/= after the Applicant was found to be in contempt of court in respect thereof. The Respondent contends that the prayers sought would defeat the subsisting injunction orders by the opening up of the Respondents quarry to be operated by the Applicant's nominee (albeit in the name of an interim manager). In this regard, the Respondent considers the application to be frivolous, vexatious and an abuse of the process of the court, particularly since it appears to have been filed to forestall the hearing of Respondent's application to have the interim orders of 20th November 2009, confirmed. In answer to the Applicant's contention that Rebecca Elizabeth Butt and Victoria Alice Sheath are not *bona fide* directors of the Plaintiff, the deponent states that she appointed her said daughters as directors, following the death of her co-director for reasons that the number of directors as per the Memorandum and Articles of Association of the company had fallen below the legal number.

In sum, the Plaintiff/Respondent contends that the opening of the company should await the determination of its application dated 19th November 2009, in which it seeks to have the Applicant herein restrained from undue interference with the operations thereof. She depones that while the business and/or operations are at a halt, the deponent continues to take care of the company expenses using her personal funds and the company assets remain well preserved.

Oral submissions were made for and against the application The Applicants main contention is that the appointment of a manager is a just and convenient way to assist the contestants herein to resolve the disputes that have arisen as regards the Plaintiff company, its assets and business following the death of the 2nd founder director.

The Plaintiff/Respondent on the other side contends that the Applicant has no *locus standi* even on a *prima facie* basis, as evidenced by the matters raised in the Replying Affidavit and that the power of the court to appoint a manager, as was held in the case of **TRIPPLE EIGHT INVESTMENTS (K) LTD — VS- CFC BANK LTD & ANOTHER H.C.C.C.NO. 1506 OF 2006** (cited by the Applicant herein) is not exercised for the sake of it and can only be exercised at the behest of a bona fide possessor of the property to be managed.

I have considered the submissions made herein as well as the several authorities cited in support thereof in light of the law. I am not persuaded that the provisions of **Order 40 Rules 1, 2 and 3 of the Civil Procedure Rules** have been properly invoked, given the facts of this suit and the application itself. There is no injunction sought against a party to the suit and no basis has been laid by the Applicant to explain the invocation of the said provisions which, in any event do not apply for the granting of the orders sought. In paragraphs 3,7,8,12,13,14,15,21 and 23 of the Supporting Affidavit the Applicant implies that her complaint is directed, not at the company itself, but at its directors, Anne Twite, Rebecca Elizabeth Butt and Victoria Alice Sheath.

The Applicant claims to have a zeal to protect the company, its business and assets but is not clear as to the danger the same are exposed to, save to say that she is opposed to any order being made for the same to be leased to Kifaru Camp, as appears paragraph 5 of her Supporting Affidavit. Such an eventuality can only take place, if at all, once the Plaintiff/Respondents' injunction application has been heard and

determined.

I do accept the Applicant's proposition that the appointment by the court, of a manager is akin to that of a receiver in a winding up cause and vice versa. In doing either, the court is guided by the well laid down procedures as have been cited by the parties hereto. Above all things, a court must be fully satisfied that property to be managed is in real danger and that the appointment is warranted for the protection of the property. The synopsis to **Order XL of MULLA** on the **Code of Civil Procedure** (authority No. 4 on the Applicants list of authorities) which deals with the appointment of Receivers enumerates the instances when a receiver may be appointed and lists them as follows:-

- "1. Joint Hindu Law**
- 2. Mortgage suits**
- 3. Testamentary suits**
- 4. Charity suit**
- 5. Partnership suit**
- 6. Rent suit**
- 7. Decree for maintenance**
- 8. Money suit".**

The Applicant has not attempted to tell this court under which category her application falls as to rely on the said authority. In the 7th authority cited, **Halsbury's Laws of England 3rd Edition**, it is stated at paragraph 639 as follows:

"In numerous other cases, persons who show a prima facie interest in property of any sort may, in a properly constituted action, if it appears to the court to be just and convenient, have a receiver appointed for its protection. ... the appointment is not, however, made unless the property is in danger, and proper parties are before the court."

I am of the considered view that the reverse situation obtains in this case, in view of what I have found as regards the status of the property and the parties against whom the Applicant's complaint is directed.

It is not in dispute that what the Applicant seeks is an equitable remedy, which is available within the discretionary powers of the court, exercisable wherever it appears to be just and convenient to do so. From the authorities cited, it is clear that a person applying must not only show a prima facie interest in the property but also demonstrate the danger the property is exposed to Prima facie, in equity, presupposes that the Applicant is properly before the court and is not actuated by ulterior motives. I cannot say this as regards the Applicant herein, who has not only demonstrated her disdain for other directors of the Plaintiff but is for all intents and purposes a condemned contemnor of this court's orders. Her claim to ownership of a majority shareholding of the Plaintiff Company, being highly contested and legally questionable, I would not consider it just and convenient to make orders as would give legitimacy to her claim with a possibility that she acquires better rights than she can claim in the circumstances of the case, over and above the claim by one whose directorship and shareholding is proved by the Memorandum and Articles of Association of the Plaintiff Company.

Considering the above, I am not inclined to allow the application, not being satisfied of its merits. Accordingly the same is hereby dismissed with costs to the Respondent Company, whose application for injunction has been unnecessarily delayed, yet the same is not contested, given the Applicants' depositions to that effect. Orders accordingly.

DATED, SIGNED and DELIVERED at NAIROBI this 1ST DAY OF JULY 2011.

M.G. MUGO
JUDGE

In the presence of:

Mr. Nyamunga
Applicant
Ms. Mwongela
Respondent

For the

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