REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

Civil Suit 22 of 2009
COAST PROPERTIES LIMITED…..……PLAINTIFF
VERSUS
ARVIND VELJI SHAH
GOSRANI HOLDINGS LIMITED…..……DEFENDANT

RULING

In its amended Notice of Motion dated and filed on 21st October 2009, the plaintiff, Coast Properties Limited seeks two primary prayers namely:-

1) an injunction restraining the defendants from effecting purported changes to the Articles of the Company directorships, bank account and signatories and any other aspect of the company in violation of the court order of 29th June 2009 to the effect that the status quo be maintained pending the hearing and determination of the plaintiff's application dated 28th May 2009.

2) An injunction restraining the defendants from effecting purported changes on the Articles of the company directorships, bank accounts and signatories and any other aspect of the company as a result of the meeting held by the defendants on 30th June 2009 in contravention of the court order of 29th June 2009 to the effect that the status quo be maintained pending the hearing and determination of this suit.

The application is expressed to be brought under the provisions of Sections 1A, 3, 3A and 63 (c) and (e) of the Civil Procedure Act and Order LI Rule 1 of the Civil Procedure Rules. Order LI was deleted from our rules way back in the year 2000 and has incorrectly been cited. The other provisions invoked by the plaintiff codify the inherent powers of the court. It is significant that Order XXXIX of the Civil Procedure Rules which empowers the court to grant interlocutory orders and temporary injunctions has not been invoked.

The application is said to be made on some seven (7) grounds expressed as follows:-

(i) That on the 29th June 2009, the court directed that the status quo obtaining as at 2nd June 2009 be maintained pending the hearing and determination of the plaintiff's application dated 28th May 2009.

(ii) That in violation of the said status quo order, the defendants purported to hold an extra-ordinary general meeting and passed certain resolutions.

(iii) That upon the purported changes, the defendants have purportedly changed the bank account and bank mandates appointing man and wife as signatories.

(iv) That the purported changes will render the pending ruling useless and is calculated to defeat the running of the plaintiff company.

(v) That the interim orders were given ex-parte on 20th May 2009 but were discharged ex-parte on 2nd June 2009 but the court nevertheless directed on 29th June 2009 that the status quo be maintained.

(vi) That the purported changes in defiance of a court order should not be allowed to stand.

(vii) That the dignity of the court ought to be preserved.

The application is supported by an affidavit of one Ateet Dinesh Jetha the plaintiff's director sworn on 10th July 2009. The affidavit is an elaboration of the above grounds. The same director swore a supplementary affidavit on 21st July 2009 in response to the defendants' replying affidavit sworn on 16th July 2009 in opposition to the application. The replying affidavit was sworn by the 1st defendant who also swore a further affidavit on 21st July 2009 in response to the aforesaid supplementary affidavit filed on behalf of the plaintiff. The affidavits, *inter alia*, give a chronology of events leading to the impugned extra ordinary general meeting of the plaintiff held on 30th June 2009 and the order said to have been disobeyed by the defendants.

When the application came up for hearing before me, learned counsel agreed to file written submissions which they duly filed. I have considered the amended Notice of Motion, the affidavits filed both in support of and in opposition to the application and the submissions of Learned counsel. Having done so, I take the following view of the matter. The plaintiff substantially seeks restraining orders against the defendants. Yet Order XXXIX of the Civil Procedure Rules was not invoked. The court has therefore not been properly moved. Be that as it may I will still consider the plaintiff's application on its merits.

This dispute revolves around what the status quo was on 2nd June 2009. Hon. Justice Sergon J, who made the order on 29th June 2009 expressed himself as follows:-

> **"Ruling is not ready. The same is stood over to 2.7.2009. The status quo as obtaining on 2.6.2009 is to be maintained until then. This order to apply to HCCC No. 21, 23 and 23."**

The ruling pending before the Learned Judge was, in respect of the defendants' application dated 28th May 2009 vide which the defendants sought the striking out of the suit and the setting aside of the orders issued on 20th May 2009. The parties do not agree on what the status quo was on 2nd June 2009. the record however shows that on that day the defendants appeared before the Learned Judge ex-parte on their said application and after hearing learned counsel for the defendants' the Learned Judge made the following order:-

> **"I am also satisfied that the plaintiff and its counsel did not make a full and frank disclosure at the ex-parte stage on 20th May 2009. I *ex debito Justitiae* set aside the ex-parte order of 20th May 2009 as prayed in prayer (c) of the Chamber Summons dated 28th May 2009. This order to apply to HCCC No. 21, 23 and 24 of 2009."**

In the application dated 28th May 2009 the defendants had, in paragraph (c) thereof, prayed that the orders given on 20th May 2009 be set aside. The latter orders had been given on the plaintiff's application dated 19th May 2009 in which the plaintiff had sought *inter alia,* the following order:-

> **"(2) That this Honourable court be pleased to restrain the defendants by themselves, their proxies, servants and or agents from interfering with and or participating in the running of the day to day affairs and or business of the plaintiff including the call of or giving any notice in respect of either special or general meetings of the plaintiff pending the hearing and determination of this suit."**

The Learned Judge on being satisfied with the prima facie merits of the plaintiff's application ordered *inter alia* as follows:-

> **"I grant prayer 2 of the Chamber Summons to last for 14 days."**

So, for 14 days, the court restrained the defendants from interfering with and or participating in the running of the day to day affairs and or business of the plaintiffs including the calling of or giving of any notice in respect of either special or general meetings of the plaintiff. That is the order which was set aside by Sergon J "*ex-debito justitiae* on 2nd June 2009. It is significant that the status quo to be preserved was not said to be that obtaining before 2nd June 2009 but on 2nd June 2009. That is the date the Learned Judge, *ex-debito justitiae*, set aside the order restraining the defendants from, among other things, the calling of any meetings of the plaintiff.

The plaintiff may have interpreted the status quo obtaining as on 2nd June 2009 to be that allowing it to run or to be run on its previous structures. That interpretation would in fact suggest that the plaintiff's application dated 17th May 2009 had been allowed to some extend. That interpretation with all due respect cannot be correct because the orders which had been made ex-parte on the said application were set aside by the Learned Judge "*ex-debito Justitiae*" i.e. as of right on the same day 2nd June 2009. The

position would have been, of course, entirely different if no ex-parte order had been made on 20th May 2009 and set aside on 2nd June 2009 or if the Learned Judge had stated that the status quo to be preserved was the one pre-existing before 2nd June 2009.

This case is clearly distinguishable from the case of **Mucuha – v – Ripples Limited: [1990-1994] EA 388** where the applicant acted flagrantly in disobedience of a prohibitory and mandatory injunction issued by the High Court. The decision of Waki J, as he then was, in **Kenya Bus Service (Msa) Limited – v – C.M.C. Motors Group Limited: Mombasa HCCC No. 547 of 1999** related tocompletely different circumstances. In that case the Learned Judge determined the status quo to be the one prevailing before the plaintiff's unlawful actions of forcible repossession of buses financed by the defendant. That, with all due respect to the plaintiff, is not the position in this case.

The plaintiff has predicted its application not on the usual principles of injunction as crystallized in the **Giella – vs – Cassman Brown & Company Limited** case but on the purported disobedience of the status quo order of 29th June 2009. The plaintiff's appeal is to the inherent jurisdiction of the court as already observed above. Well, the appeal has not succeeded since the status quo obtaining as on 2nd June 2009 was not violated by the defendants. The basis of the plaintiff's application has therefore collapsed. As no attempt was made to demonstrate the conditions for the grant of a temporary prohibitory injunction crystalized in the **Giella – vs – Cassman Brown & Company Limited** case, the plaintiffs amended Motion on Notice is for dismissal. I dismiss it accordingly. As the plaintiff is a limited liability company owned by among others the defendants, I will make no order as to costs. It is so ordered. This decision to apply to HCCC Nos. 21, 23 and 24 of 2009.

DATED AND DELIVERED AT MOMBASA THIS 17TH DAY OF FEBRUARY 2010.

F. AZANGALALA
JUDGE

Read and delivered in the presence of:-
Obura holding brief for Kiarie for the Applicant and Muyaa holding brief for Kinyua for the Respondent.

F. AZANGALALA
JUDGE
17TH FEBRUARY 2010