



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS
CIVIL CASE NO. 516 OF 2010 (OS)

MOSE NYAMBEGA

ONDIEKI.....PLAINTIFF

VERSUS

**DEEPA HELMAL DOSH
CFC STANBIC BANK OF KENYA**

LTD.....DEFENDANT

RULING

1. The Chamber summons dated 28th July, 2010 seeks for orders to freeze all the transactions in respect of accounts Nos 020400801190401 and 01400801190401 in the name of DCDM Associates which are operated by 1st respondent with the Interested Party. Secondly, the applicant seeks for an order of injunction to restrain the defendants, their servants, or agents from operating the partnership business called BDO East Africa or committing the said partnership to any further financial or investment deals. This application is supported by the grounds that the respondent has fraudulently registered another firm with almost a similar name with the partnership thereby confusing and diverting the partnership’s income and clients to the new business.

2. The respondent is also accused of transferring the income from the partnership’s accounts to other accounts. The applicant is apprehensive that if the plaintiff is allowed to continue to alienate and transfer the partnership accounts and clients, he will suffer prejudice and irreparable loss. This application is supported by the affidavit of Moses Nyambega Ondieki sworn on 28th July, 2010. According to the applicant, he registered a firm known as BDO East Africa together with the respondent as per the certificate of registration issued on 25th January, 2010. However, they did not execute a partnership deed. He relied on an e-mail written by the respondent on 3rd February, 2010 in which the respondent appointed Clifford A H Chip as a new partner without consulting the respondent.

3. That email was the beginning of the disagreements as the applicant claims he was not consulted by the respondent who indicated that the office would be run by other people. The plaintiff realized that the respondent had opened other accounts in the name of DCDM Associates where the income of the partnership was transferred. Due to the disagreements, the applicant communicated with the respondent his intention to dissolve the partnership Under Section 41 of the Partnerships Act with effect from 30th June, 2010.

4. This was also confirmed by the letter by the plaintiff’s Advocate. According to counsel for the applicant, the applicant has established a prima facie case with probability of success. The existence of the partnership is confirmed by the certificate of registration from Registrar of Companies that shows the applicant and respondent as the proprietors of a business name registered as BDO East Africa Kenya. It will therefore be in the interest of justice to grant the orders sought.

5. This application was opposed; counsel for the respondent relied on the replying affidavit by Deepa Hemal Doshi sworn on 11th August, 2010. It was contended that the applicant was an employee of the respondent and not a partner. The certificate of registration relied on by the applicant is a mere change of particulars and the applicant is added as one of the persons carrying on business under the name and at the named address given. Under Section 4 of the Partnership Act, the Law makes Provisions as to what constitutes a partnership. The relationship must be inferred from the partnership deed. There is no such document before the court. The applicant was offered employment by a letter dated 6th October, 2009 as an associate this only shows the relationship was that one of employer/employee.

6. The applicant is faulted for withholding material information regarding his employment with the respondent. Since the applicant came to court *ex parte*, seeking for equitable relief, it was necessary for him to make candid disclosure of material documents. The fact that the applicant was an employee is a very relevant material to disclose. The employment letter shows the applicant was an employee at a set salary thus an employee can not seek the freezing of bank accounts which accounts are operated and owned by somebody else. The applicant is also not claiming to be a creditor he has not shown any connection between him and the accounts he is seeking to freeze. The applicant also does not know the amount of money in the account, he is not even a signatory to the accounts nor has he had any access as his terms are purely governed by the letter of appointment.

7. This application seeks for the freezing of bank accounts and an interim order of injunction. It is common ground that the plaintiff is not a signatory to the bank accounts, he did not even present any information regarding those accounts by way of statements because he is a stranger to the accounts. The court is not even able to establish whether those accounts belong to the business name known as BDO East Africa Kenya that the plaintiff claims to be a proprietor. For that reason, an order freezing somebody else's account cannot be granted based on a mere allegation.

8. As regards the second order that seeks for an order of injunction, the applicant has a burden of establishing that he has a *prima facie* case with a probability of success. Secondly, irreparable harm which can not be compensated for in damages would arise and if in doubt, the matter should be determined on a balance of probability. See the oft' cited case of **Giella Vs Cassman Brown and Company Limited 1973 EA 358**. The Court of Appeal has explained in the case of **Mrao Ltd V Fist American Bank of Kenya Ltd & 2 others {2003} KLR 125** what constitutes a *prima facie* case in the following terms:

9. In this case the plaintiff's claim is that he is a partner in the business name known as BDO East Africa Kenya whose resources are allegedly being siphoned by the respondent to third parties. That is the basis of his claim in the originating summons and this application. However, there is no partnership deed to confirm the depth and length of the terms of the partnership. On the part of the respondent, it is denied that the change of particulars registered on 25th January, 2010 conferred any rights to the applicant as a partner the applicant was a salaried employee and it is in that capacity he was registered in the change of particulars.

10. I am of the humble opinion that to resolve the issue of whether the applicant was a partner or an employee will require oral evidence. On whether the applicant will suffer irreparable loss, this can be answered in the negative based on the evidence on record. This is because the change of particulars where the applicant is reflected as carrying on business under the name of BDO East Africa was only registered on 25th January, 2010. Immediately thereafter, that is precisely eight days, on 3rd February, 2010 there was disagreement because the applicant was unhappy with the unilateral appointment of other people into the management of the partnership. This is coupled with the absence of a partnership deed. This leads me to the irresistible conclusion that the applicants case does not meet the thresh hold set out for granting orders of injunction.

11. For the above reason, the plaintiff's application dated 28th July, 2010 is dismissed with costs in the cause.

Ruling signed and submitted for delivery on the 9th day of November 2010

MARTHA KOOME
JUDGE

Delivered and countersigned on 12th day of November 2010.

P KIHARA KARIUKI
JUDGE