



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS) Civil Case 783 of 2009

MYC4 A/S..... PLAINTIFF

VERSUS

EBONY CAPITAL KENYA LIMITED.....1ST DEFENDANT

JAMES MAINA2ND DEFENDANT

A N D

MARY WAMBUI MWANGI & 180 OTHERSAPPLICANTS

RULING

1. Since the plaintiff filed this Notice of Motion dated 22nd October 2009, so much water has gone under the bridge, as I notice several other applications have been filed while this application is pending for determination. I will however, concern myself with the Notice of Motion which was argued before me which seeks for injunctive relieves against the Respondents from removing documents information or the records from the premises of the 1st Respondent. This application is premised on the grounds stipulated on the body thereto and the supporting affidavit of Mads Kjaer sworn on 22nd October 2009.

2. The brief background of this matter may be stated; the plaintiff is an agent of investors who claim to have transferred through the Plaintiff as the principal a sum of **€1,652,249** to the 1st Respondent to lend to borrowers approved by the 1st Respondent according to a memorandum of understanding executed between the plaintiff and defendant on the 16th and 26th February 2009 in Nairobi. According to that MOU the Respondents were supposed to act in good faith and protect the best interest of the applicant in preserving the funds entrusted by the applicant for use by the borrowers in terms of the agency relationship.

3. Under that MOU, the Applicant had unconditional right to carry out an audit upon request, and the 1st Respondent had a corresponding obligation to make itself, its employees and all information regarding the money lent available upon request for audit and inspection either by the plaintiff or a person authorized for that purpose by the plaintiff. The 1st Respondent was also supposed to keep all the documentation relating to the loans it administers for inspection by the plaintiff.

4. It is alleged that in breach of those contractual obligations the Respondents have failed after request to allow the audit. The 1st Defendant is an agent and could not deny the principal to audit and access to the documents was expressly provided for in the MOU. The applicant conducted a spot check on the loans administered by the Respondent between 22nd September 2009 and 1st October 2009 and the applicant became apprehensive that the Respondent was not administering the loan fort folio in accordance with the MOU. The spot check reviewed the following anomalies:

- (a) Potential for conflict of interest and bias in decision making
- (b) Potential risk of loss of independence and mismanagement
- (c) Weak internal audit department
- (d) Weak management information systems
- (e) Incomplete filing leading to risks of misinterpretation, potential default and fraud
- (f) Weak credit approval process

5. Following that revelation the applicant suspended the respondent from any other internet based infrastructure and engaged the services of an audit firm of KPMG to conduct a forensic audit on the 1st Defendant with effect from 21st October 2009 at its premises in Nakuru. The Respondent purported to terminate the contract in accordance with Clause 8 of the MOU without giving the requisite three months notice or the right to be heard before a neutral arbitrator.

6. The applicant request to have the Respondent's books and documents of the internet portfolio be audited were refused by the Respondents. The plaintiff's representative Mad Kjaer who had traveled from Denmark and had traveled to Nakuru with a team of auditors from KPMG were refused to access to the documents. They were rudely asked to leave the 1st Respondent's offices. The Applicant contends that there is need to examine the loan fort folio to ascertain the extent of the loss. There are a large number of loan defaulters and the investors who provided the loan are likely to suffer irreparable loss.

7. This application was opposed by the Respondents who relied on replying affidavit sworn by James Maina on 30th October 2009. The Respondent also raised preliminary objections on points of law which were argued together in reply. It was submitted that the applicant is not a legal entity capable of maintaining a legal action under **Section 365 of the Companies Act**, a company incorporated outside the Republic of Kenya must obtain a certificate of incorporation in Kenya. The plaintiff company has not done so and they therefore lack *locus standi*.

8. The Plaintiff described itself as an agent of the investors when they entered into MOU with the Respondents. However the MOU exhibited was to last only for six months from 26th June 2009 which was a trial period, after which the parties were, supposed to evaluate their overall working relationship. There is therefore no contract between the Plaintiff and the Defendants and no cause of action is disclosed.

9. Moreover the so called MOU was not sealed with the stamp of MYC4. Counsel argued that it is only the defendant who has a contract with the borrowers. The Plaintiff does not even know the borrowers and the confidential information regarding the borrowers cannot be disclosed to the Plaintiff. The Defendant owes the borrowers a duty of confidentiality. The Defendant sent a notice to the borrower informing them of the plaintiff's request to inspect and audit their documents.

10. The borrowers rushed to court and filed Nakuru HCCC 306 of 2009 where an interim order was obtained restraining the Defendants from handing over the security documents belonging to the borrowers to the Plaintiffs. Finally, it was submitted that the applicant has not established a *prima facie* case with a probability of success to warrant the granting of the orders especially the mandatory order of injunction which is only granted in very rare and special circumstances.

11. The above is the brief summary of the pleadings and the rival submissions. The principals for granting an order of injunction are well settled. The applicant must establish a *prima facie* case with a probability of success. Secondly, irreparable harm which would not be compensated for in damages would arise, and if in doubt, the court is supposed to determine the matter on a balance of convenient.

12. It is not in disputed that the Plaintiff entered into a contract with the Defendants on 16th February 2009. The Defendants,

however contend the MOU that was entered into, lapsed after six months which was supposed to be the trial period. However, the document I see on record dated 16th February 2009, indicates the MOU shall be in force for a period of three years. There are terms stated therein, in which the Defendant as the provider and administrator of the Online loan Platform, was supposed to do certain things under Clause 4.2.12.

13. **“PROVIDER will make itself, its employees and all information and documents pertaining to any MYC4 Businesses presented by PROVIDER available immediately, upon request, for audit or inspection, to MYC4 or any person authorized for the purpose by MYC4 to ensure credibility, transparency and accountability in the information posted on the Online Platform; in particular, PROVER shall make personnel available for training.**
”

14. From the above provisions of the MOU, I am not persuaded that the MOU lapsed, and that the Plaintiff cannot access the information regarding the administration of the loans lent out from the internet Platform.

The *locus standi* of the Plaintiff is also challenged on the grounds that the foreign company has not complied with the provisions of **Section 386** of the **Companies Act**. Counsel for the Plaintiff argued that the Plaintiff was not operating in Kenya but using the Defendants as the agent. A careful reading of the **Section 386** of the **Companies Act**, which provides;

“Every company, including a company incorporated outside Kenya and having a place of business in Kenya, being a deposit provident or benefit society, shall, before it commences business, and also on the first Monday in February and the first Tuesday in August in every year during which it carries on business, deliver to the registrar for registration a statement in the form set out in the Ninth Schedule, or as near thereto as circumstances admit.”

14. Going by the above provision of the law, the Plaintiff’s company is not doing business in Kenya, it has no place of business in Kenya, and it is represented by the defendant as the agent. Therefore it was not necessary to register the company under the companies Act.

15. Can the Defendants after signing the MOU and receiving the loans, now turn round and claim that the MOU was not stamped with the Plaintiff’s official stamp, and claim it is a nullity? That should be a trial issue on whether the contents of the MOU are binding as between the parties notwithstanding lack of the official stamp.

16. Based on the evidence on record, I am of the opinion that the plaintiff has established a prima facie with a probability of success. A prima facie case was defined by the Court of Appeal in the case of; **Mlao Ltd v First American Bank of Kenya Ltd**

“A prima facie case in a civil application includes but is not confined to a “genuine and arguable case.” It is a case which, on that 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 as to call for an explanation or rebuttal from the latter.”

17. Applying the above principles, there are fundamental issues that are raised which should go on trial. Firstly, under Clause 8 the contract could be terminated after each party gave three months notice. The Defendant purported to terminate the contract. It is evident from the record, that the Plaintiff protested the threat by the Defendant to terminate the MOU because notice was not given and parties were not given a hearing before a neutral arbitrator appointed and agreed upon by both parties. I also find there are two other applications which are pending for determination, an application seeking to freeze the accounts held by the 1st Defendant, and an application by the borrowers seeking to be joined in these proceedings. 18. As I see it, the parties are in for a long haul, because even if these applications are to be heard, this matter cannot be resolved until the parties determine the issues in controversy through a formal hearing either through the court, or they choose to appoint a neutral arbitrator. For now this court has a duty in the interest of justice and for expeditious determination of the dispute to give directions and orders which will assist the parties move forward. (See Section 3B (1) of the Civil Procedure Act).

19. For those reasons, I am of the opinion that, granting prayer numbers 2 and 3 of the Notice of Motion dated 22nd October 2009, will be appropriate. This is because if an audit is carried out of the funds disbursed by the Defendants as agents of the Plaintiff, that will assist the parties to proceed to the next stage on who, between the Plaintiff and the Defendants will pay what to the other and how the loans that have already been disbursed will be administered. In other words if the parties can not work together, the MOU should be brought to an end legally.

20. The orders granted will remain in force only for a period of three months within which the audit should be carried out, and so that the matter can proceed for the determination of the other issues. The costs of this application will be in the cause.

RULING READ AND SIGNED ON **11th December 2009** AT NAIROBI.

M. K. KOOME
JUDGE