



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 513 of 2007 (OS)

IN THE MATTER OF THE CIVIL PROCEDURE RULES ORDER XXVI

AND

IN THE MATTER OF DECLARATION TRUST DEED BETWEEN THEMIS INVESTMENTS LIMITED (PRINCIPAL)

AND JAMES DAVID KABEBERI (NOMINEE)

DATED 10TH MAY 2006

BETWEEN

THEMIS INVESTMENTS LIMITEDPLAINTIFF

VERSUS

JAMES DAVID KABEBERIDEFENDANT

RULING

The plaintiff filed an Originating Summons on the 28th day of September 2007. At the same time, the plaintiff filed a Notice of Motion under certificate of urgency seeking interim orders by way of an injunction restraining the defendant from disposing off the 40,000 shares held by him in trust and for the benefit of the applicant as indicated in the Declaration of Trust (deed) dated 11th May 2006 executed by both parties and duly presented for stamping on 8th August 2006. The plaintiff obtained a temporary order of injunction and now seeks for the confirmation of the said order pending the hearing and determination of the Originating Summons filed on 28th September 2007.

It is the case of the plaintiff that by a declaration of trust deed dated 10th May 2006 and executed by the parties, the defendant as trustee/nominee declared, confirmed and covenanted to hold in trust and for the benefit of the plaintiff as principal 40,000 ordinary shares in City Finance Bank Limited, which shares were purchased with funds from the plaintiff. That by further covenant in the said Trust deed, the defendant bound himself to transfer back the said shares to the plaintiff as and when called upon. And that the plaintiff made several requests and demands to the defendant to abide with the terms of the trust

deed, but the defendant refused to execute transfer forms as required. The defendant claims an unwarranted payment amounting to Kshs. 6 million as a condition for transfer.

It is also contended that the defendant by the same breath is claiming ownership and the right to sell the said shares in contravention and breach of trust and the fiduciary relationship. The plaintiff therefore contends that it stands to lose its entire investment in the shares that cost Kshs.5,669,156/- as the defendant has demonstrated intentions of converting the same.

What is the defendant's reply to the allegations made against him by the plaintiff? The defendant in his replying affidavit filed on 24th October, 2007 says that he was loaned Kshs.5,669,156/= by the plaintiff on the understanding that the loan was for purposes of purchasing 40,000 shares in **City Finance Bank Limited**. And that as a security for the loan, he was to deposit the share certificate with the plaintiff, which he did on 3rd November 2006. The defendant also states that he is not in possession of the share certificates, therefore not in a position to transfer the shares.

The defendant then states the alleged declaration of trust is defective for want of certainty and unenforceable as it does not present the mutual intention of the parties as being to create a trust. The defendant also brings another angle that he offered his professional services to **City Finance Bank Limited** and its shareholders and that is how he acquired the shareholding in the Bank. He further alleges that after negotiations as how to repay the loan advanced, he entered into discussions with the plaintiff's Managing Director **Mr. Richard Njoba**, where it was mutually agreed that the shares be sold to a 3rd party and the proceeds after the deduction of the loan amount be shared at 60/40.

The advocates for the parties then filed skeleton submissions and after taking into consideration all the relevant matter, I am in a position to address the real issues in contest. No doubt the application is for an equitable remedy of injunction and the usual and well trodden path of *Giella's* case must be followed. In my understanding and it needs no authority to support, that the purpose of an injunctive remedy is to preserve the status quo of the subject in issue until the suit is heard and determined. The preservation is for the purposes of giving effect to an ultimate order for specific performance to enforce the alleged term of the trust deed subject of this dispute.

The defendant does not say whether he signed and executed the declaration of trust deed. However he now says that it is defective for want of certainty and unenforceable as it does not present the mutual intention of the parties as being to create a trust. He also attacks the deed document as one lacking in material particulars i.e. the intended beneficiaries. I doubt whether that is the true position as expressed in the alleged declaration of trust.

From the onset and without making a definitive conclusion, the plaintiff is indicated and/or mentioned as the principal, while the defendant is described as a nominee. In concise Oxford English Dictionary nominee is defined as;

“a person who is nominated or a person or company, not the owner in whose name a company, stock etc is registered”.

And principal is defined as;

“a person for whom another acts as an agent or representative”.

The basis or the central document in this litigation is the purport, effect, intention, meaning and interpretation of the declaration of trust deed dated 11th May 2006. The plaintiff says that the intention of the parties is that ownership of the shares would vest in the defendant as a trustee but at the option of the legal owner, the plaintiff herein.

According to the declaration of the trust deed dated 11th May 2006, the principal and nominee inter alia agreed that the defendant would hold the shares in his name in trust and for the benefit of the plaintiff.

And in, clause No.2 it was mutually agreed;

“That the nominee hereby covenants with the principal that he will as and when called upon by the principal at the cost and expense of the principal to transfer the shares into the principal or to his order”.

It is also a term of the said document that all income arising out of or in respect of the shares and all ongoing and liabilities in respect of the same shall be to the account of the principal. **Mr. Njagi** learned counsel for the applicant contends that the intention of the parties is unequivocal and there is no room for ambiguity. And when the principal has called upon the nominee to execute transfer documents, he is obliged to do so.

In reply the defendant contends that he borrowed the money from the plaintiff to purchase the shares and the shares are his, subject to repaying of the loan advanced by the plaintiff. The defendant further contends that in consideration of the defendant providing professional services as a business advisor to help turn around the financial position of the Bank he was lent money to acquire the shares subject to repayment of the loan.

On my part and without giving conclusive verdict, I think the issue of who owns the shares is central to the determination of this dispute. Ultimately the court would be called upon to pronounce on the legal and beneficial ownership of the 40,000 shares held by the defendant. I do not think it is right to allow either party to interfere with the crux of the dispute by dealing with the said shares in a manner that dislodges and/or displaces one party. I think it is in the mutual interest of both sides to ensure the subject in contest is not displaced from its current position.

As stated, both parties have claimed ownership of the shares and in my view one party cannot be allowed to sell the shares as it pleases him. That would be destroying the central issue in the dispute before court. The rights and liabilities of both parties would have to be established before one party can be allowed to deal with the shares in the manner he/she deems fit. At this stage I refuse to be persuaded by the argument that the shares can be sold and the monies invested in an escrow account.

It must be noted that the legal right or legitimacy of such act is being questioned by the plaintiff. It is contended that the defendant has no power to sell that which he has no legal title over. I think that is a sound legal proposition, which has to be determined at full hearing of the dispute. This court cannot give or accord the defendant a legal right which would destroy the foundation and/or central issue in contest between the parties.

In the premises I am persuaded to hold that the plaintiff’s application has passed all the tests in the grant of an injunction. I therefore grant prayers No.2 and 3 in the application dated 28th September, 2007. Costs shall be in the cause.

Dated, signed and delivered at Nairobi this 15th day of February, 2008.

M. A. WARSAME

JUDGE