



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (MILIMANI COMMERCIAL COURTS)**  
**Civil Case 381 of 2006**

**FONTANA ENTERPRISES LIMITED.....PLAINTIFF**

**VERSUS**

**MWANGI CHOMBA.....RESPONDENT**

**RULING**

The Plaintiff in this case filed this suit on 19<sup>th</sup> July, 2006 simultaneously with a Chamber Summons application. The Applicant invoked **Order XXXIX rules 1, 2, 3 and 9 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act**. It sought two substantive prayers as follows:

2. THAT an injunction do issue restraining the Defendant his servants, agents, and/or those operating under him from interfering and/or meddling with the affairs and running of the Plaintiff's company pending the hearing and determination of this suit.
3. THAT a mandatory injunction do issue against the Defendant compelling him to desist from holding himself out as a director of the Plaintiff's company.

The basis upon which the application was grounded was stated on the face of the application in the following terms:

1. THAT the Defendant is neither a shareholder nor a director of the Plaintiff's company.
2. THAT the Defendant is interfering and/or meddling with the affairs of the Plaintiff.
3. THAT the Defendant is unlawfully holding himself out as a director of the Plaintiff's company.
4. THAT the Defendant is threatening the Plaintiff's clientele thereby causing huge losses in this business.
5. THAT its only fair and just that the Defendant be restrained.
6. THAT the Defendant will not suffer any prejudice if the orders sought are granted.

The application was supported by an affidavit sworn by one of the directors of the Plaintiff Company, JOHN WANJOHI CHOMBA of even date.

The application was certified urgent by Ochieng, J. on 19<sup>th</sup> July 2008. The same Judge heard it on 27<sup>th</sup> July 2006 and set down the ruling for 26<sup>th</sup> October, 2006 and at the same time issued orders in terms of prayers 2 and 3. On 26<sup>th</sup> October, 2006, Ochieng, J. did not read the ruling for reasons he recorded and which I reproduce hereinafter verbatim:

***“Although the ruling is ready, neither of the parties is in court to receive it.***

***The executive officer is directed to write to the parties, requiring them to explain their failure to attend court, for the ruling.***

**JUDGE”**

The Applicant took mention dates and eventually on 11<sup>th</sup> April, 2008, this court ordered that the application be served afresh and re-heard as there was no ruling in the file. The application was finally heard before me on the 24<sup>th</sup> June, 2008.

Mr. Chebii for the Applicant argued the application on its behalf. The Defendant did not appear for the hearing despite proper service of the application upon him. Mr. Chebii's submissions were very brief. He submitted that he relied entirely on the supporting affidavit of Chomba dated 19<sup>th</sup> July, 2006. In the supporting affidavit, Mr. Chomba deposes that the Defendant was once nominated as one of the directors of the Plaintiff Company between 2004 and October, 2005. Mr. Chomba continued to depose that after the Defendant left the directorship of the company he procured contracts in November, 2005 with National Water Conservation and Pipeline Corporation, using the name of the Plaintiff and without informing its directors. The Defendant was however unable to perform them leading to their cancellation. Mr. Chomba deposes that in December, 2005, the directors of the Plaintiff sat and relieved the Defendant of his duty as an Agent of the Company, a position he had assumed in October, 2005, when he ceased to be a director.

Mr. Chomba deposes further that despite not being a director, or agent or shareholder of the Plaintiff Company, the Defendant continued to hold himself out as a director and or continued meddling with the affairs of the company. Mr. Chomba annexed exhibit 2, a Search Certificate to prove that the Defendant was not neither director nor shareholder nor was he involved in the Plaintiff's Company in any way. Mr. Chomba also annexed exhibit 3, a demand letter written by NGANI & OLUOCH Advocates on behalf of FONTANA ENTERPRISES LIMITED, the Plaintiff Company, to National Water Conservation and Pipeline Corporation, demanding that the Corporation admits liability for breaching the contract between it and the Plaintiff. Mr. Chomba deposed that the demand letters were written on the instruction of the Defendant.

Mr. Chomba has annexed a letter by M.K. CHEBII & CO. Advocates dated 13<sup>th</sup> February, 2006, to National Water Conservation and Pipeline Corporation disowning the Defendant and apologizing to the Corporation for inconvenience caused by the said letters.

I have considered this application together with the affidavit sworn in support of the said application. The Applicant seeks two injunctive reliefs. It seeks an interlocutory injunction to restrain the Defendant from interfering and or meddling with the affairs and running of the Plaintiff Company. It also seeks a mandatory injunction against the Defendant compelling him to desist from holding himself out as a director of the Plaintiff's company

The principles upon which an interlocutory injunction and an interlocutory mandatory injunction can be granted are somewhat similar. Generally for an interlocutory injunction, an Applicant must meet the three conditions stated in the celebrated case of **GIELLA VS. CASSMAN BROWN & COMPANY 1973 EA 358** which are as follows:

- “1. An applicant must show a *prima facie* case with a probability of success;**
- 2. An injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury;**
- 3. when the court is in doubt, it will decide the application on the balance of convenience.”**

For interlocutory mandatory injunction, in addition to meeting the conditions in **Giella's case**, supra, there must be special circumstances. The Court of Appeal in the case of **KENYA BREWERIES LIMITED & ANOTHER VS. W. OKEYO CA NO. 332 OF 2000** cited Halsbury's Laws of England with approval which are as follows:

**“The test whether to grant a mandatory injunction or not is correctly stated in Vol. 24 Halsbury's Laws of England 4<sup>th</sup> Edn. Para 948 which reads:**

***A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but, in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks it ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied, or if the defendant attempted to steal a march on the plaintiff ..... a mandatory injunction will be granted on an interlocutory application”.***

Same principle was enunciated in **LOCABAIL INTERNATIONAL FINANCE LIMITED VS. AGRO EXPORT AND OTHERS [1986]** 1 ALL ER 901 thus:

***“A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant had attempted to steal a march on the plaintiff. Moreover, before granting a mandatory interlocutory injunction the court had to feel a high degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction.”***

The above case has been cited with approval and adopted by the Court of Appeal. It is therefore clear that the Applicant must satisfy the three conditions in Giella’s case, supra for both prayers and for the interlocutory mandatory prayer there must in addition be special or exceptional circumstances. The mandatory injunction will not issue if the court has not decided that there is a simple and summary act which could easily be remedied by the mandatory injunctive relief.

Regarding the interlocutory injunction the Applicant has established that the Defendant has interfered and intermeddled with the affairs and running of the Plaintiff’s company. It has been shown through the annexed correspondences that the Defendant has made demands for payments and threatened legal action against a Government Corporation using the Plaintiff’s name. The official search from the Company’s Registry is annexure JNC2. It shows that at the time the Defendant used the Plaintiff’s name, he was neither director nor share holder of the Company.

The Defendant has been served with this application but has failed to file any documents in opposition. The application is unopposed, which in turn means that the Applicant’s averments are uncontroverted.

Regarding this prayer, I am satisfied that the Applicant has shown that the Defendant’s meddling and interferences with the Plaintiff’s company’s running and its affairs is likely to cause it harm or injury. The Defendant Company. In that light therefore, the Plaintiff has established that it has a prima facie case with a high probability of success. Even if the second condition on Giella’s case, supra, were to be applied, the application will still be determined in the Plaintiff’s favour. The confusion that may arise if the Defendant is not stopped from interfering with the running of the Plaintiff Company may cause irreparable harm, as it is likely to compromise its operations and business.

The act done by the Defendant in the matter before the Court is a clear example of how the Plaintiff Company could be affected. By threatening to sue innocent parties, the Defendant threatens the very basis of the Plaintiff Company’s operations and the chances of compromising the Companies interests are quite imminent. The effect could be far reaching including loss of business and threat of suits being filed against the Plaintiff Company by aggrieved parties. The prayer for interlocutory injunction is deserved and ought to succeed.

Regarding the second prayer for interlocutory mandatory injunction, the Plaintiff seeks the injunctive relief directed at the Defendant’s act of holding himself out as a director of the Plaintiff Company. The holding out as a director of the Plaintiff Company is a simple act. As already stated, the Plaintiff has demonstrated that there has been holding out by the Defendant as a director of the Plaintiff Company, and that as a consequence, demands have been made, and threats issued to parties in the Plaintiff’s name, without the knowledge or consent of the its directors or shareholders. This act of holding out can greatly affect the running of the company and its business affairs. The Plaintiff has established on a prima facie basis that there is a clear case of holding out by the Defendant. The application is clearly deserved and should succeed.

Having come to the conclusion I have of this matter, the Plaintiff’s application dated 19<sup>th</sup> July, 2006 is granted as prayed in terms of prayer 2 and 3 of the application. The Applicant should also get the costs of the application.

**Dated at Nairobi this 11<sup>th</sup> day of July, 2008.**

LESIT, J.

**JUDGE**

**Read, signed and delivered, in the presence of:**

Mr. Chebii for the Defendant/Applicant

No appearance for the Respondent

LESIT, J.

JUDGE