



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

**Civil Case 699 of 2006**

**FAKIR MOHAMED**  
**SIDI.....PLAINTIFF**

**VERSUS**

**SUDHIR J. PATEL.....**  
**.....DEFENDANT**

**RULING**

**Application by Chamber Summons dated 05.03.2008.**

The application was served but no appearance by Respondent on the hearing date. This suit is between two directors and shareholders of one company known as "Intereact Limited" The Plaintiff was Managing Director holding 50 % shares. The Defendant was the Financial Director of the Company. The Company was a lessee of LR. 19049 Lokichogio Township in Turkana District. The prayers in the Plaint are that the Defendant do render accounts relating to Kshs.526,8740,000/= and declares all interest earned and pays costs of this suit.

Turning to the application dated 05.03.2008 the same is brought by Plaintiff under the provisions of Order 38 Rule 1 A & B and Rule 2 thereof. The substantial orders sought are 5, namely that the Defendant be ordered to produce before court a full statement of accounts of Intereact Ltd in relation to bank account No. 1046004 at Chase Bank (k) Ltd, and that Chase Bank (k) Ltd (not a party to this suit) be ordered to allow the applicant access to deal with account No.1046004 being mandated to do so as a 50 % shareholder of Intereact Ltd, and that the Defendant be enjoined from unliterary dealing in the affairs of Intereact Ltd. and that the Defendant be ordered to deposit security to this court in an account to be held jointly by Advocates of both Applicant and Defendant and that this court do issue any order, directions and relief in the circumstances of this suit for the interest of justice and as this court may deem fit to grant.

Application is supported by two affidavit sworn by the Plaintiff on 05.03.08 and on 24.09.2008 in which it is sworn that the applicant is a holder of 50 % shares in the Company. Although this court (Justice Warsame) did issue a consent order that the Applicant be allowed to access and to make withdrawals from Company account. After some correspondence the Chase Bank admitted that there was no objection to the application issuing instructions in respect of that account 1046004 since the bank records showed that the Applicant was mandated to do so. In his further affidavit, the Applicant swears that the Defendant has arbitrarily set up Companies Kate Camp Ltd and Intereactive Transporters Ltd. on the aforesaid plot No.19049 Lokichogio which he single handedly draws income. And that the establishment

of the two businesses was without his consent. And that the Defendant has diverted funds of the Company to these other business outfit. This is unfair. The court should order that all income from the activities on Plot No. L.R.19049 be shared equally between Applicant and the Defendant. The Applicant swears that the Defendant has caused him to be harassed by his employees and this has made him to suffer greatly as a result of which he has been and admitted to hospital at Mulango, Kampla and M.P. Shah, Nairobi.

In paragraph 11 of the supporting affidavit it is sworn that the defendant is planning to relocate from Kenya and hence the need for him to deposit security in relation to this suit.

As stated above, this application is brought under Order 38 Rule 1 (a) and (b) which provides for arrest and attachment before judgment.

**Rule (1)** provides: where at any stage of a suit ..... the court is satisfied by affidavit or otherwise.....

**1 (a)** that the Defendant with intent to delay the Plaintiff or to avoid any process of the court, or to obstruct or delay the execution of any decree that may be passed against him has also absconded or left the local limits of the jurisdiction of the court or is absent to abscond or leave the local limits of the jurisdiction of the court or has disposed of or removed from the local limits or jurisdiction of the court his property or any part thereof or a(b) that the Defendant is about to leave Kenya under circumstances affording a reasonable probability that the Plaintiff will or may thereby be obstructed or delayed in execution of any decree that may be passed against Defendant in that suit. The court may issue a warrant to arrest him and bring him to court to show cause why he should not furnish security for his appearance.

Rule 2 deals with security to be furnished. Considering this orders prayed for, it is not clear that an order under the above provisions is prayed for. There is mention of Defendant planning to relocate from Kenya but there is no evidence that he is planning to leave Kenya with intent to delay or avoid or obstruct the Applicant suit. The evidence of Affidavits filed by the Applicant indicates that the Defendant is carrying on business within the same premises subject of suit where he has set up two businesses. The provisions of Order 38 demand that the intention of the Defendant must be shown and proved. I can see only an allegation here.

Regarding provisions of Order 25 (1) and (b) the court is empowered to order that security for the whole or any part of costs of any Defendant or third party be given by any other party. In default of complying with order for security, the Court may dismiss the suit.

The Defendant has filed a statement of Defence which was filed on 18.01.2007 to date, the Plaintiff has not brought the suit to a hearing. Section 3A Civil Procedure Act reserves the inherent powers of court, empowering the court to stretch its hand in cause of justice.

In view of the above provisions of law and upon considering the able submissions of Dr. Ekuru Aukot, Counsel for the applicant, I order that the Defendant do produce and file in Court full statements of Account No.1046004 held for Intereact Ltd with Chase Bank (k) Ltd.

Regarding prayer No.4 in the Chamber Summons, the Chase Bank (k) Ltd is not a party to this suit. In any case exhibit "FM 4" shows that the bank has no objection to Applicant having access to the account as he is a signatory. Therefore, no order is+ issued under this prayer. On prayer numbered 5 in the application, there is sufficient evidence that the Applicant is not enjoying any benefits as Managing Director of the Company but that the Defendant is in full control in exclusion of the Applicant. Order is granted as prayed.

Regarding prayer numbered 6, there is no evidence offered to warrant security being ordered against the Defendant. I see no reason to make such an order at this stage.

The court grants orders which are sought and justified. I do not see any justification to grant orders under

paragraph 7 thereof. In the circumstances, orders are made in accordance prayers 3 and 5.

The application is granted to that extent. Other prayers are hereby dismissed. Costs to the Applicant.

Orders Accordingly.

DATED this 10<sup>th</sup> day of November 2008.

**JOYCE N. KHAMINWA**

**JUDGE**