REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 256 of 2007

QUANTUM CAPITAL LIMITED ………………….......………1ST PLAINTIFF

LLOYD MUPOSHI …………………………......…..………..2ND PLAINTIFF

PETER MUKIZA …………………………..………....….….3RD PLAINTIFF

VERSUS

STRATEGIC WORK PLACE LIMITED ……………......…...1ST DEFENDANT

DUNCAN ONYANGO ……………………………....…….2ND DEFENDANT

PETER MUNGE MURAGE ……………………...………3RD DEFENDANT

ESTHER NJIRU OMULELE ……………………………4TH DEFENDANT

QUANTUM TRAINING KENYA LTD…………...….……5TH DEFENDANT

RULING

On 18th May, 2007 the plaintiffs/applicants filed a notice of Motion dated 16th May, 2007. The application is under ***Order 50 Rule 1***, ***Order 39 Rules* 1** and 2 of the Civil Procedure Rules and ***Section 3A*** of the Civil Procedure Act. It has 9 prayers but the main prayers are for an order of injunction be issued against the 1st, 2nd, 3rd and 4th defendants from interfering and/or running, managing and/or transferring shares of the 5th defendant pending the hearing and determination of this suit. And a mandatory injunction to issue against the 1st defendant requiring it to transfer 70 shares held in the 5th defendant to the 1st plaintiff. Thirdly there is also a prayer for reinstating the 1st, 2nd and 3rd plaintiffs as shareholders and directors of the 5th defendant.

It is alleged that the 1st, 2nd, 3rd and 4th defendants purportedly through a special resolution passed on 3rd April, 2007 removed the 1st plaintiff as a shareholder of the 5th defendant and the 2nd and 3rd plaintiffs have been removed as directors of the 5th defendant. That the share transfers dated 3rd April, 2007 are not properly executed and witnessed but were forged. And in the place of the 2nd and 3rd plaintiffs, the 3rd and 4th defendants have been appointed as directors/shareholders of the 5th defendant without following the provisions of the law and articles of Association of the 5th defendant.

It is further alleged that the agents of the 1st defendant and 5th defendants have colluded in selling the

5th defendant's shares to the 3rd defendant without giving the 1st plaintiff an opportunity to exercise its pre-emptive rights. And that no money in the tune of Kshs.500,000/= was paid either to the 1st plaintiff or 2nd plaintiff as a consideration for the purported sale of the 1st plaintiff's shares in the 5th defendant. The plaintiffs contend that they would suffer irreparable loss as the 5th defendant is no longer within their ownership and control.

The application is supported by three affidavits of **Lloyd Muposhi** being supporting, supplementary and further affidavit. He states that sometimes in the month of March, 2007, the 2nd defendant approached him with a proposal to sell shares held in the 5th defendant by the 1st plaintiff and that the 3rd plaintiff also ceases being directors of the 5th defendant. After deliberation the offer was declined.

He depones that he remembers very well that the 2nd defendant was in the office of the 1st plaintiff, where the 1st plaintiff had temporarily given space to the 2nd and 5th defendants to operate. He says that the 2nd defendant requested him to sign on a blank share transfer form to confirm to him that there was an intention to sell pending the approval of the 1st plaintiff's board, which he did. And that at the time he signed on the share transfer form, the board of the 1st plaintiff had not agreed on the value of the shares held by the 1st plaintiff in the 5th defendant. And that on 10th May, 2007, he received a letter dated 8th May, 2007 indicating that the plaintiffs were no longer shareholders and directors of the 5th defendant.

The deponent further alleges that he was never served with any notice of a meeting between the plaintiffs and the 1st, 2nd and 5th defendants in which it was resolved for the removal of the plaintiffs as shareholders and directors respectively of the 5th defendant. And since he had called off any further negotiations in the sale of the ownership and control of the 5th defendant, no such transaction could have taken place. He contends that there was no special meeting held on 3rd April, 2007 in the shared offices of the 1st plaintiff and 5th defendant, hence the 3rd and 4th defendant could not have been appointed as a director and secretary.

The defendants have filed a replying affidavit through the 2nd defendant who claims to be a director of the 5th defendant and who also claims to be well conversant with all the facts of this matter. He states that sometimes in February, 2007, the 2nd plaintiff approached him and indicated that the 1st plaintiff was experiencing cash flow problems and was unable to meet its obligations to the 5th defendant. And on 1st March, 2007 he held a meeting with the 3rd plaintiff, while the 2nd plaintiff was teleconferenced from Mombasa. The said meeting was held to chart the way forward as a result of the indications given by the 2nd plaintiff that the 1st plaintiff wanted to pull out of the 5th defendant. There were further discussions and correspondence through various emails culminating in an email by the 2nd plaintiff sent on 8th March, 2007 stating that the financial support of the 1st plaintiff to the 5th defendant ceased on 28th February, 2007.

The deponent contends that he was given an executed transfer form and the consideration of Kshs.500,000/= being his investment made in the 5th defendant. He also states that a meeting was held on 3rd April, 2007 in the 5th defendant's offices and the special resolution was in respect of change of directorship. And that he has been advised by the defendants' Advocates that there is mandatory requirement for the share transfer to be embodied in a special resolution. He also alleged to have been advised that the returns as filed are properly on record and there are no glaring anomalies as alleged to entitle the plaintiffs to the orders sought.

The position of the defendants was supported by **Mrs. Thangai** who submitted that the entire suit is incompetent, as there is no company resolution showing that the plaintiffs had been sanctioned to file the present suit.

On the transfer of shares she contended that an instrument of transfer can be transferred through

execution. The 2nd plaintiff is a director of the 5th defendant and therefore can sign any transfer on behalf of the company. The 2nd plaintiff is deemed to be a subscriber and had authority to execute the transfer. And any defect committed was not fatal.

Mrs. Thangai further submitted that the allegation of fraud has no basis, as there is no evidence to show that the transfer form had been forged. She asserted that prayers 5 and 6 are final orders which cannot be granted. In short she submitted that there is no prima facie case established by the plaintiffs and there is no special circumstance which is disclosed to warrant the grant of mandatory injunction.

I have considered the application and the peculiar nature of the orders sought by the plaintiffs. I have also taken into consideration the affidavits filed by the parties and the submissions from both Advocates of the parties. The issue for determination is whether the applicants are entitled to the orders sought especially whether this court can grant the mandatory injunction sought by the plaintiffs.

The grant of an injunction is an equitable remedy and parties seeking the intervention of equity must show an expression of good faith and clean hands. It must be noted that a court of equity would frown and refuse an injunction when the person seeking is not acting in good faith. Equally a court of equity would readily grant an injunction if it is satisfied that the defendant's conduct is below the expectation of equity. The underpinning factor is whether the applicant has brought itself within the realm of **Giella vs Cassman Brown & co. Ltd [1973] E.A. 358**.

It is incumbent upon a party seeking an injunction to demonstrate a prima facie case with probability of success. The party must be aware that an injunction will not normally be granted unless he might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly if the court is in doubt it would decide the case on the balance of convenience.

Admittedly the applicants are seeking to benefit from an equitable remedy, therefore they must show a good account of themselves as far as the issues in dispute is concerned. A court of equity would not normally allow a party to benefit from its own wrong and at the same time a defendant would not be able to defeat the rights of a litigant, when the fault is largely attributable to him. The powers of the court in an application like the present one is discretionary. And since the discretion is judicial, it cannot be exercised without any recourse to the law and facts of the case. As they say judicial discretion has to be exercised on the strength and basis of the law and facts of the particular case. It means although the powers are wide, it is also restrictive.

It is clear from the materials that were presented before me, that the parties were having a mutual business relationship. The 1st plaintiff owns 70 shares in the 5th defendant company, while the 1st defendant owns the remaining 30 shares. The 2nd and 3rd plaintiffs were directors of the 1st plaintiff company which owns 70 shares in the 5th defendant company. In essence the 1st plaintiff is the majority shareholder in the 5th defendant company. It is alleged the 3rd and 4th defendants are now directors and secretary of the 5th defendant respectively. No doubt the 2nd defendant sometime in the month of March, 2007 had approached the 2nd plaintiff to sell shares of the 1st plaintiff held in the 5th defendant, but the transaction was declined.

It is contended by the plaintiffs that at the time of negotiations the 2ndf plaintiff signed a blank transfer of shares. And he subsequently learnt that through a letter written by the defendants' Advocates that the 1st plaintiff was not a shareholder of the 5th defendant.

Mr. Moibi Advocate for the plaintiffs submitted that a scrutiny of the documents used by the defendants to transfer the shares of the plaintiffs reveals a great deal of forgery and misrepresentation. He stated that the documents were not properly executed. The share transfer shows that the transferee is the 2nd plaintiff, whereas the shares were held by the 1st plaintiff. There is no seal on the execution and the seal is not witnessed by two directors or a director and secretary of the company.

I have stated that it is pre-requisite factor that before the court can exercise its discretion to grant an

order of injunction, the applicant must satisfy the court that his case, falls within the conditions precedent in the grant of an injunction. The injunction is granted to preserve the status quo pending the ascertainment of the rights of the parties at a full hearing. It is also granted to restore or regain what has been lost through an express contravention of the law., In essence an injunction is given in protection or assertion of some legal right or equitable right already infringed or is about to be infringed.

The 1st plaintiff is called **Quantum Capital Limited**, while the 5th defendant is also known as **Quantum Training Kenya Limited**. The shares in **Quantum Training Kenya Limited** is held by;

(1) Quantum Capital Limited – 70 shares

(2) Strategic Workplace Limited – 30 shares

The 2nd and 3rd plaintiffs are the directors and shareholders of the 1st Plaintiff Company which owns the shares in the 5th defendant company with the 1st defendant company. In short the shareholders of the 5th defendant company before the dispute arose were the 1st plaintiff and the 1st defendant herein. What prompted the dispute is an alleged blank transfer form signed by the 2nd plaintiff in the process of negotiations to sell the shares and/or shareholding of the 1st plaintiff in the 5th defendant company. The transfer was then effected in favour of the 1st defendant. This was done through special extraordinary General Meeting held on 3rd April, 2007.

According to that extraordinary meeting, there were special resolutions where 4 items were duly passed;

(1) That Lloyd Muposhi and Peter Mukiza be and are hereby removed from holding office as directors of the company (read Quantum Training Kenya Limited).

(2) That Peter Munge Murage is hereby appointed as a director of the company and as such authorized to undertake the duties, tasks and responsibilities in respect to the company and to transact, manage, carry on and do all and every business matter and all things requisite and in any manner authorized, permitted or as contemplated in the Memorandum of Articles of Association of the company.

(3) That Esther Njiru Omulele is appointed as the Company Secretary of the company in place of Kodume Stephen Babu.

(4) That Esther Njiru Omulele shall arrange for the filing of this resolution with the Registrar of companies and of all necessary returns consequent upon the business dealt with at the meeting.

According to the extra ordinary meeting held on 3rd April, 2007 and the special resolution that emanated therefrom, the 2nd and 3rd plaintiffs were removed as directors of **Quantum Training Kenya Limited**. They were replaced by **Mr. Peter Munge Murage** as a director of the company and **Esther Njiru Omulele** who was appointed as a Company Secretary. From the evidence on record **Mr. Peter Munge Murage** and **Esther Njiru Omulele** are Advocates of the High Court of Kenya. The two also appear to be partners in the law firm of **Muriu, Mungai & co. Advocates** who are acting for the defendants in this matter. It is a basic principle of law that a party shall never act in a matter where he/she has an interest in the determination and/or resolution of the dispute. The fact that two of the partners are central to this dispute , should have dissuaded the law firm from acting in this matter. Be that as it may, I see no reason to fault the said firm in acting for the defendants. But since some of the senior partners are part and parcel of this dispute, then, the law firm should have been reluctant to participate in this proceeding on behalf of the defendants.

Before one address his mind to the resolution of 3rd April, 2007 concerning **Quantum Training Kenya Limited**, it is important to appreciate how the 2nd plaintiff transferred the shares of the 1st plaintiff in the

5th defendant company. It is alleged that the 2nd plaintiff as Managing Director of the 1st plaintiff transferred all the shares (70 shares) of the 1st plaintiff to the 1st defendant. The consideration is said to be Kshs.500,000/= paid by the 1st defendant. However, it is clear beyond doubt that no cent exchanged hands between the parties to this dispute. There is no dispute that the directors and shareholders of **Quantum Capital Limited** are two individuals. The 3rd Plaintiff did not sign any transfer form, whether blank or otherwise transferring his shares either to the 1st defendant or to the 2nd plaintiff. There is no evidence to show that the 2nd defendant was empowered to transfer the shares of the 1st plaintiff in the 5th defendant to the 1st defendant without board resolutions. No evidence to show that the 2nd plaintiff was the Managing Director of the 1st Plaintiff Company, so as to say that he had powers and/or authority to act on behalf of the Company. The sale of shares of a company is not like selling second hand clothes in Gikomba. It is preceded by strict and stringent conditions. The sale of shares of a company can only be transacted as per the requirement and regulations set in the Articles of Association of the particular company. Let me also say that a Managing Director of a company cannot usurp the powers of the directors and shareholders of the company. The running control management and regulation of a limited liability company is not a one man show. It is a collective job with strict regulations and rules. The directors or any person dealing with the company cannot go outside the Memorandum and Articles of Association of the Company.

The right to transfer shares is restricted and is usually governed by the provisions contained in the Memorandum and Articles of Association of the company. In this case the Articles of Association of the 1st plaintiff gave the road map to be followed in the sale and transfer of shares of the company. Article 7(2) - 7 clearly restricted the sale and dealings in the shares of the 1st plaintiff Company. In my view any person willing to benefit or sell the shares of the 1st Plaintiff Company had to conform or comply with the express and clear provisions in Article 7(2) - 7 of the Articles of Association.

Article 13 states;

"**No business shall be transacted at any general meeting unless a quorum of members is present at the time when the meeting proceeds to business".**

There is also a requirement that a resolution be in writing signed by all members of the company for the time being entitled to receive notice and to attend and vote at the general meeting. At any general meeting a resolution is put to vote. It is further required that the quorum necessary for the transaction of the business of the directors may be fixed by the directors. No doubt that the 1st plaintiff was the holder of the majority of the shares in the 5th defendant and in such circumstances the law requires that the vote of majority shareholder cannot be taken away by the minority shareholder without a proper mechanism and machinery.

It is clear that the persons who attended the meeting of 3rd April, 2007 is not indicated in the resolution. It is not indicated whether all the proper parties attended or were notified to attend. The law is that notice of every extraordinary general meeting shall be given to every member whether or not his registered address is within Kenya. There is no evidence that the 3rd plaintiff attended the alleged crucial meeting which transferred his shares and shareholding in the 1st plaintiff company. Having gone through all documents filed by the parties, I have not been able to see;

(1) Any notice of intention to hold a meeting concerning the transfer of shares of the 1st plaintiff in the 5th defendant.

(2) I have not been able to see any board resolution authorizing the 2nd plaintiff to engage in any transaction concerning the sale and transfer of shares of the 1st plaintiff in the 5th defendant.

(3) Any notice of document showing that the 3rd plaintiff had participated in the alleged transfer of the shares of the 1st plaintiff.

(4) No evidence to show that the 3rd plaintiff had made any transfer or authorized any person to sell and transfer his portion or share in the shares he held in the 1st plaintiff company.

(5) It is also clear that the transfer and sale of the shares of the 1st plaintiff in the 5th defendant was solely effected by the 2nd plaintiff.

(6) The alleged transaction was not sanctioned and/or authorized by all company directors and shareholders. It suffices to say that a shareholder or director cannot bind the interests, rights, duties, obligations and responsibilities of other directors/shareholders through signing transfer of shares form, whether blank or otherwise.

In this case the transfer form is not properly and legally witnessed by the relevant persons. The company seal is missing from the alleged document. The seal is used pursuant to board resolutions and kept by the directors of the company. And every instrument to which the seal shall be affixed shall be signed by either two directors or one director and the Company Secretary. This was not done and that is an outright contravention of the law and rules of the company in question. I do not think that is a defect which is not fatal to the legality and propriety of the whole transaction.

The transfer of 70 shares to the 1st defendant by the 2nd plaintiff is witnessed by **Mr. Duncan Onyango**, the deponent of the replying affidavit on behalf of the defendants. He is not a director of the 1st plaintiff company, neither is he a Company Secretary, to witness the signature of the 2nd plaintiff. That should have been a cause for rejecting the registration at the Company's registry. It was, in my view overlooked intentionally by the personnel at the department of Registrar-General of Companies. If that was done, this dispute would not have reached the corridors of justice. But simply other people are not diligently and correctly doing their work, the parties find themselves in a vacuum to rush to court for a very simple and straight forward forgery or misrepresentation.

The fact that the transfer of shares was not properly done can be seen in the letter dated 8th May, 2007 by **M/S MURIU, MUNGAI & CO**. Advocates to the 1st Plaintiff company. The letter stated in paragraph 2;

"**That following the severing of business relations between our client (Quantum Training Kenya Ltd) and yourselves (read Quantum Capital Ltd) the items, virtual and physical listed in the schedule annexed hereto remained in your possession. Our client would like the same back and we are instructed to demand from you as we hereby do that you immediately hand over the same to us on behalf of our said client".**

The Advocates of the 5th Defendant some of who had substantial interest in the matter were demanding return of various properties from the 1st Plaintiff Company. Some of the essential items demanded for return or hand over were;

(1) Company seal

(2) Memorandum & Articles of Associations – originals

(3) Certificate of Incorporation (original)

(4) PIN certificate

(5) Company Date Stamp

(6) All bank accounts held cheques and statements.

(7) All folders containing client base, tenders, receipts, invoices and stationery.

This explains why the transfer form does not have the Company seal and why it was not witnessed by the relevant authority empowered to do so.

Coming to the extra ordinary General meeting held on 3rd April, 2007 concerning the 5th defendant, the pertinent factors are;

(1) There is no indication of the Agenda of the said meeting and who called the said meeting.

(2) The Persons notified to attend and who attended is not indicated.

(3) Although the 2nd and 3rd plaintiffs were removed as directors of the 5th defendant company, there is no evidence that they were called to participate in the proceedings that led to their removal. The circumstances leading to the removal is not clear. The reasons for replacement is a misery. Section 185 of Cap 486 is very clear as to how a director is removed and replaced. The conditions set in that section was clearly and flagrantly violated in the present matter.

(4) It is clear that the shareholders of Quantum Training Kenya Limited were;

(1) Quantum Capital Ltd and

(2) Strategic Workplace Ltd.

It is not clear who was representing the two companies in the extra ordinary general meeting.

(5) It is also manifestly clear that Mr. Peter Munge Murage was appointed as director but it is not clear who he was replacing and in which company.

I am therefore satisfied that the whole extraordinary general meeting involving the two companies held on 3rd April, 2007 is a farce. It is a farce because the clear provisions of the law were violated by the defendants. The transfer was based on deception, deceit and distortion of material facts. It was falsely and deceitfully done to contravene the law and dispose the rights of the Plaintiffs in the 5th defendant company. The 1st and 5th defendants' agents are materially in contravention of the law. May I remind them of the implication of their conduct under section 77 and 87 of the Company's Act Cap 486. The transfer of shares as allegedly done by the 2nd plaintiff was improper and irregularly done in violent contravention of the law and Articles of Association of the Company.

There was no consideration for the said transfer as no money was paid to the directors of the 1st plaintiff company. The 3rd defendant who witnessed the said transfer did so without powers and with dirty hands due to his prior involvement in the dispute. He had an interest or substantial benefits in the transaction therefore he could not usurp the powers reserved for the Company directors and Secretary in witnessing the said transfer. I am in agreement with **Mr. Moibi** Advocate that the removal of the directors and transfer of shares was not done in accordance with the Memorandum and Articles of Association of the company.

The share transfer shows that the transferee is the 2nd plaintiff whereas the shares were held by the 1st plaintiff. The 1st plaintiff has two shareholders. There is no seal in the execution of the transfer of shares and the seal has to be witnessed by two directors or by a director and secretary of the Company. The powers reserved for the shareholders and directors of the 1st plaintiff were purportedly exercised by strangers. This court cannot sanction outright abuse of the process of the law. I think the circumstances in this case are exceptional and clear to warrant the grant of a mandatory injunction, because the defendants or its agents have taken the law into their own hands and taken action which should have warranted them to go through the legal process to address their grievances.

The conduct of the defendants dislodged and/or displaced the plaintiffs of their legal right and interest

which they are entitled to enjoy in comfort and with no hindrance. The court has therefore an obligation to restore the parties to the position before the coup was committed by the defendants. A party whose property and shares is taken in violation of the law is prima facie and ipso facto entitled to the intervention of the court. The defendants cannot be allowed to occupy a position which is acquired in contravention of the law. The acts of transferring the shares in the manner it was done is forceful and in violent disturbance of the law. This court therefore has a duty to disturb the new acquired status quo so that the parties can revert to their original position.

Paragraph 10 of the replying affidavits explains the circumstances that lead to the acquisition and transfer of the shares to the defendants. The deponent states;

"**that the executed transfer form was given to me by an employee of the 1st plaintiff duly signed and sealed, not forged as alleged or at all. Indeed the signature is the same one in the Memorandum and Articles of Association".**

It is manifestly clear that the transfer was not duly signed and sealed. It is also clear that there was no meeting which precipitated the resolution for the transfer of shares held by the plaintiffs in the 5th defendant. In my view the whole transaction was carried out in a manner that bore the hallmarks of a forgery dealing. The right forum was not followed in the acquisition and transfer of the shares from the plaintiffs. In my opinion the whole transaction is void because it was granted by an illegal conduct. Without being disrespectful the conduct of the deponent of the replying affidavits and other agents of the 1st and 5th defendants looks like a dishonest and deceitful. The court cannot allow parties to benefit from a dishonest transaction, which had the effect of displacing the rights and properties of the plaintiffs.

I think I have expressed that the Plaintiffs are entitled to all the orders sought, therefore the application dated 16th May, 2007 is allowed with costs.

Dated and delivered at Nairobi this 15th day of June, 2007.

M. A. WARSAME

JUDGE