



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
CIVIL CASE.542 OF 2007**

PANKAJ VRAJLAL SOMAIA PLAINTIFF

VERSUS

BILL KIPSANG ROTICH

FLORENCE ROTICH

METRO PETROLEUM LIMITEDDEFENDANTS

R U L I N G

The plaintiff, Pankaj Vrajlal Somaia seeks by Chamber Summons dated 18.10.2007 the following main orders:-

1. That pending the hearing and determination of this suit:
 - (a) The defendants be restrained from issuing any loading orders for the 3rd defendant's products wherever stored and an order be made to the effect that only the plaintiff and the 1st defendant can make a loading order for the 3rd defendant's said products.
 - (b) The defendants be restrained from operating the accounts opened at Oriental Commercial Bank and Consolidated Bank Limited in the name of the 3rd defendant or from opening or operating any other account in the name of the 3rd defendant apart from the accounts at Giro Bank Limited and Imperial Bank Limited and any other accounts where the plaintiff and the 1st defendant are the signatories of the accounts.
 - (c) The accounts opened by the defendants at Oriental Commercial Bank Limited and Consolidated Bank Limited in the name of the 3rd defendant be frozen.
 - (d) The 2nd defendant be restrained from holding herself out as a director of the Company and be restrained further from interfering in any way with the running of the 3rd defendant's Company's business.
 - (e) The defendants be restrained from dealing with or removing the assets and products of the company from its business premises and/or from wherever the same are stored.
 - (f) The defendants be restrained from excluding the plaintiff from directorship and management of the 3rd defendant company.

- (g) An order be made directing the registrar of companies to cancel the following documents:
- (iv) Form of annual return of the 3rd defendant company filed on 31.12.2006 by M/S Kilonzo and Company Advocates.
- (v) Notice of Change of directors and secretaries of the 3rd defendant company filed by M/S Kilonzo and Company Advocates.
- (vi) Return of allotment of the 3rd defendant company made in 2007 and filed by M/S Kilonzo & Company Advocates.

The application is brought under Order XXXIX Rules 1,2,3 and 9 of

the Civil Procedure Rules, Section 3A of the Civil Procedure Act and all enabling provisions of the law. 10 grounds are set out on the face of the application. The primary ones are as follows:-

1. That the plaintiff is a director and 50% shareholder of the 3rd defendant company.
2. That the 1st and 2nd defendants have now purported to remove the plaintiff from directorship of the Company and exclude the plaintiff from its management and the plaintiff has learnt through documents filed at the Companies Registry by M/S Kilonzo & Company Advocates that the 2nd defendant has been appointed a director of the company and allotted 100 shares in the Company.
3. That the purported appointment of the 2nd defendant as a director of the 3rd defendant and the allotment of 100 shares to the 2nd defendant are irregular, null and void for the reasons that the 3rd defendant company has not held any meeting or passed any resolution allowing the appointment of the 2nd defendant as a director or authorizing the allotment of 100 shares to the 2nd defendant.
4. That the plaintiff has further learnt that the documents filed by M/S Kilonzo and Company Advocates at the Company Registry show that with effect from 3.9.2007, the plaintiff ceased to be a director of the 3rd defendant which position is absurd and misleading since the plaintiff has never resigned as director of the said company and no resolution of the company has been passed to remove the plaintiff from its directorship.
5. That the defendants have caused two other accounts to be opened in the name of the 3rd defendant at Oriental Commercial Bank and Consolidated Bank which actions are also irregular as no Board Resolution has been passed for the opening of such accounts.
6. That the plaintiff is not a signatory to the new accounts and is apprehensive that the accounts could be used to siphon and misappropriate the Company's funds without the plaintiff's knowledge.
7. That the company has products worth about Kshs.100,000,000 awaiting a loading order for the same to be released which loading order should be given by the plaintiff and the 1st defendant as directors of the Company and the plaintiff is apprehensive that the 1st and 2nd defendants will use the fraudulent documents purported to name the 1st and 2nd defendants as directors and issue loading orders for the products which action will be highly detrimental to the plaintiff and will lead to the sum of Kshs.100,000,000.00 being misappropriated or siphoned by the 1st and 2nd defendants.

There is an affidavit sworn by the plaintiff in support of the

Application and filed herewith. There is a further affidavit sworn by the plaintiffs and filed on 1.11.2007 in response to the replying affidavit sworn by the 1st defendant. The 1st defendant has also sworn a supplementary affidavit in further opposition to the application.

The main points taken in opposition are that the plaintiff has not satisfied the conditions for the grant of the injunctive reliefs sought, that the plaintiff's interests are those of a shareholder in the 3rd defendant but not as a director; that the plaintiff has set up a rival company and has lost interest in the 3rd defendant and if the orders sought are granted the plaintiff will take away all customers of the 3rd defendant; that the plaintiff resigned as a director of the 3rd defendant and the returns filed with the Register confirm that position and that if the orders sought are granted the effect will be to paralyse the operations of the 3rd defendant.

The plaintiff filed this suit by way of a plaint filed on 18.10.2007 seeking *inter alia* declaratory orders, temporary prohibitory injunctions, temporary mandatory injunctions in the same terms as sought in the Chamber Summons filed simultaneously with the plaint; Accounts and damages. The defendants have entered appearance and filed a joint defence: I have perused the pleadings. I have also considered the application, the affidavits sworn in support of and in opposition to the application. Learned Counsel for the plaintiff made oral submissions and relied on a bundle of authorities he had filed. Learned Counsel for the defendant too made oral submissions and also relied upon authorities he had previously filed.

I have considered the submissions of Learned Counsel in so far as they are relevant and germane to the present application and will not stray into the province of the trial judge. It is now well settled that where a party's legal or equitable rights have been violated or are threatened with violation by the unlawful acts of another an interlocutory injunction will issue. In the case of an interlocutory prohibitory injunction the necessary conditions were laid down in the rule making case of Giella vs. Cassman Brown & Co. Ltd. [1973] EA 358. They are as follows:-

Firstly an applicant must show a prima facie case with a probability of success at the trial. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt it will decide the application on the balance of convenience.

With regard to an interlocutory mandatory injunction, the same principles apply. But in addition an interlocutory mandatory injunction will be granted only in exceptional and clearest of cases. See the case of Locabail International Finance Ltd. vs. Agroexport and others [1986] 1 ALL ER 901.

With regard to the injunctive reliefs sought the plaintiff relies on several facts and circumstances. He has alleged that he is a 50% shareholder in the 3rd defendant and therefore a director together with the 1st defendant who also holds the remaining shares. He has also alleged that he has been irregularly removed from the directorship by the 1st and 2nd defendants using forged documents. He has further alleged that no meetings of the Board of Directors have been held to pass resolutions to effect the actions complained of and false returns have been filed with the Register of Companies. He has further alleged that the Company bank accounts have been changed without his knowledge or consent. Detailed particulars of the improprieties are given.

The defendants have of course denied all those allegations by the plaintiff. All the matters and issues alleged and denied are weighty and cannot be adjudicated upon at this stage upon affidavits. The affidavits themselves run into numerous paragraphs with numerous annexures. From the material availed by the court, it cannot be said that the issues raised are without serious basis. For instance

annexture A exhibited in the replying affidavit is the document relied upon by the defendant as evidence of the resignation of the plaintiff as a director. Prima facie, the document does not appear to be a resolution of the 3rd defendant. The defendant has also not exhibited a resolution appointing the 2nd defendant as a director of the 3rd defendant or the resolution by which 100 shares were allocated to her.

The plaintiff on his part has exhibited documents that prima facie show that he is indeed a 50% shareholder of the 3rd defendant company. He has also exhibited purported returns filed with the Registrar of Companies which returns are denied by the defendants. He has also exhibited the letter dated 19.10.2007 from the Registrar of Companies addressed to the 3rd defendant withdrawing his letter dated 2.10.2007 and advising the Company that changes to the directorships and shareholding of the company must abide with the provisions of the Companies Act and the Articles of Association of the Company. That letter is discredited by the defendants. The plaintiffs have also exhibited a document in respect of director's accounts showing that the 3rd defendant is indebted to him in the sum of Kshs.37,312,923. There is also his letter dated 3.3.2003 addressed to Imperial Bank Ltd. authorizing the latter to liquidate an FDR of Kshs.35 million to the 3rd defendants account. The defendants are of the view that the documents are self serving.

In view of the material availed, I am inclined to grant the temporary prohibitory injunction sought.

The plaintiff has also on prima facie basis shown that the 1st and 2nd defendants may be acting in contravention of the Articles of Association of the 3rd defendant. They may also have irregularly changed the management of the 3rd defendant using documents that the Registrar of Companies has disowned. In the premises this is a case where a temporary mandatory injunction will serve the ends of justice.

In conclusion therefore I will allow prayers No.3 (a), (b), (c), (d), (e) and (f).

The above orders are granted upon the condition that the plaintiff files by 1.00 p.m. on 7.12.2007 an appropriate undertaking under oath as to damages. The defendants have liberty to apply.

Costs shall be in the Cause.

DATED and DELIVERED at NAIROBI this 4th day of December 2007.

F. AZANGALALA

JUDGE

Read in the presence of:- Bugo holding brief for the plaintiff and Kilonzo for the defendants.

F. AZANGALALA

JUDGE

4/12/07