



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA**

Civil Case 4 of 2006

KENYA KAZI LTD..... PLAINTIFF

VERSUS

NAHID MOOSA UMAR & ANOTHER..... DEFENDANT

RULING

The suit herein was commenced by a plaint filed in court on 16th November 2005. By an application by a chamber summons later 8th November, 2005 and taken out under order XXXIX rules 2 and 3 of the Civil Procedure Rules, the plaintiff applicant seeks two orders which are exactly the same as the reliefs prayed for in the plaint. These are orders for:-

- a) An injunction to restrain the defendants by themselves, their servants or agents or otherwise, from carrying on business under the name of Trace Ltd or any other name relating to the trade of the plaintiff in furtherance of breach of the agreement of 3rd March, 2004 and 31st March 2004, and**
- b) An injunction to restrain the defendants by themselves, their servants or agents or otherwise, from inducing away or/or soliciting customers of the plaintiff to shift to the 2nd defendant or any other persons related to the 1st defendant in furtherance of breach of the agreements of 3rd March, 2004 and 31st March, 2004.**

These prayers are, word for word, exactly the same as the prayers for reliefs(a) and (b) as set out in the plaint. The plaintiff/ applicant, by its counsel, undertakes to abide by any order as to damages this court may order and also prays that the costs of this application be provided for.

The three main grounds upon which the application is based are that:-

- (i) The 1st defendant, by his actions, has rendered the benefits of the covenant under the agreements of 3rd March, 2004 and 31 March, 2004 which inured to the plaintiff as per the intendment thereof, totally infractious and redundant.**
- (ii) The defendants have caused a fundamental breach to have occurred of the said agreements.**
- (iii) As a direct consequence the defendants have unlawfully and unjustly reaped monetary gains**

and continued so to do while the plaintiff conversely suffered huge loss and damages and continues so to do.

The application is supported by the annexed affidavit of James Omwando, a director of the plaintiff company, sworn on 8th November, 2005.

In opposition to the application, the first defendant swore a replying affidavit on 29th November 2005 and filed it in court on 1st December, 2005. On behalf of the second defendant, a replying affidavit was sworn by Uhsam Moosa, the managing director, on 29th November 2005, and filed in court on the same day.

At the hearing of the application, Mr. Shah appeared with Mr. Weloba for the applicant while Mr. Swaleh appeared for the respondents. The entire suit as well as this application revolve round a dispute on a clause on the agreement between the parties on restraint of trade. After considering the application, the supporting and replying affidavits, and the documents annexed thereto, I take the view that the main issues that arise for determination are whether the clause in restraint of trade is valid; if so, whether there is a breach, and if so the consequent remedy, if any, and against who. As there is an arbitration clause, however, the matter will have to be resolved through the arbitral process. Of concern now is the application for an interlocutory mandatory injunction.

The basic facts of this matter are not in dispute. On 3rd March 2004, the shareholders of the plaintiff company, hereinafter referred to as the purchasers, entered into a memorandum of understanding with the shareholders of Tudor Security Services Limited & Radio Sentry Limited, hereinafter referred to as "the owners", whereby the plaintiff undertook to purchase the owner's business as a going concern on terms to be mutually agreed. Clause 10 of the Memorandum of understanding states as follows:-

" The Owners shall execute a contractual undertaking not to engage in the operations of the security company or similar trade in competition with the Purchaser within a geographically defined area for a period of 5 years from the date of Agreement."

Pursuant to this clause, the parties executed a share purchase agreement on 31st March, 2004 in which clause 7.1 thereof provided as follows:-

"The Vendor undertake (sic) with the Purchaser That they will not (and shall procure that its shareholders will commit in writing) for a period of five years from the completion date within Nairobi, Mombasa, Kilifi, Eldoret and Kisumu –

(a) either on their own account or in conjunction with or on behalf of any person, firm or company carry on or be engaged or interested, directly or indirectly whether as shareholder, partner or agent in carrying on any business similar to, in competition or potentially in competition with, the business of the company as carried on in the year prior to completion;

(b) they will not either on their own account or in conjunction with or on behalf of any person, firm or company solicit or entice away or attempt to entice away or procure that another person should do the same from the company, the custom of any person, firm or company who shall at any time within the year before completion have been a customer, client, distributor, agent or enter into any contract for sale and purchase or accept any business from any such person.

(c) ..."

The main allegation in this matter is that after selling the business as a going concern, the vendors resorted to carrying on the same business as that carried out by the plaintiff, and also soliciting and enticing away the vendor's erstwhile customers from the purchaser. This has been alleged to be done through the medium of the second defendant which is a limited liability company, and it is the plaintiff's case that what the defendants have done is a violation of the provisions of clause 7.1 of the share purchase

agreement.

Denying the allegation, the first defendant deposes in his replying affidavit that he is neither a shareholder nor a director of the second defendant, and that he is not engaged in any way whatsoever in the provision of security services. Furthermore, he maintains that he is not an employee, an agent or servant of the second defendant. Consequently, he contends that he has not breached the memorandum of understanding dated 3rd March 2004, or the share purchase agreement dated 31st March, 2004.

The second defendant's defence is summed up in paragraph 11 of the replying affidavit of Uhsam Moosa, its managing director. In that paragraph, Mr. Moosa avers as follows-

“The company's said advocate has also advised me and I verily believe the same to be correct that the orders sought by the plaintiff cannot issue for the following reasons -

- (a) There is no privity of contract between the plaintiff and the company as regards the said memorandum of understanding and share purchase agreement.**
- (b) The company is a distinct legal entity separate from shareholders and directors.**
- (c) The orders sought are calculated to encourage restrictive trade practices contrary to the law.**
- (d) The shareholders of the company are adult with full capacity to contract and not under the control or guardianship of their father, the first defendant in the suit.**
- (e) Competition is essential in every sphere of trade, commerce and service provision so as to enhance quality”.**

There is no denying that Trace Limited, the second defendant herein, has not denied carrying on business in direct competition with the plaintiff. At the same time, there is no doubting that the second defendant is a body corporate. As such it is a distinct legal entity, separate from its shareholders and directors. It is also a fact that the memorandum of understanding was entered into “between the shareholders of Tudor Security Limited & Radio Sentry Limited” as the owners, and “the shareholders of Kenya Kazi Limited” as the purchasers. It is further true that the parties to the share purchase agreement were Nahid Moosa Umar, the first defendant herein, Mohamed Musa Umar, Khalid Moosa Umar and Masud Musa Umar as the Vendors, and Kenya Kazi Limited as the Purchaser. Arising out of these facts, it is consequently a fact, as it is the law, that there is no privity of contract between the plaintiff and Trace Limited, the second defendant herein. In these circumstances, is the plaintiff entitled to an interlocutory mandatory injunction?

The principles governing the grant of interlocutory injunctions are clear. In the landmark decision in **GIELLA v. CASSMAN BROWN & CO. LTD** (1973) EA 3585, Spry, V.P. said as p 360-

“ The conditions for the grant of interlocutory injunctions are now, I think, well settled in East Africa. Firstly, an applicant must show a prima facie case with a probability of success. 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 an application on the balance of convenience.”

The first condition is that the applicant must show a prima facie case with a probability of success. The phrase “prima facie case” has been defined in Osborn's Concise Law Dictionary as follows:-

“prima facie case (Of first appearance.) A case in which there is some evidence in support of the charge or allegation made in it, and which will stand unless it is displaced.”

The expression “prima-facie” itself is also defined in Jowitt's dictionary of English Law as -

“as first, on the face of it.”

When you look at this case at first sight, what do you see? You see a first defendant who denies breaching clause 7.1 of the share purchase agreement. In paragraph 3 of his replying affidavit, he says-

“I am neither a shareholder nor a director of Trace Limited and I am not engaged in any way whatsoever in the provision of security services. Furthermore I am not an employee, an agent or servant of Trace Limited, the 2nd defendant.”

On its part, while they are not denying carrying on business in competition against the plaintiff, the second defendant was not privy to the share purchase agreement, and therefore was not bound by clause 7.1 thereof which outlaws competition against the plaintiff. It is only by an ingenious way of looking at the timing of the incorporation of the second defendant and the relationship between the 1st defendant and the shareholders of the second defendant that one suspects that all may not be well. It may well be that the scheme for the incorporation of the second defendant was hatched by the 1st defendant in collaboration with the shareholders of the second defendant, and I strongly suspect that that was the case. However, there is no evidence on the face of the record to show that that was indeed the case, and a court of law should be guided by facts, the evidence and by the law. While I am suspicious that the defendants herein colluded to set up the 2nd defendant to compete against the 1st defendant contrary to the provision of clause 7.1 of the share purchase agreement, I am not able to say it for a fact. Consequently, I am not able to find that the applicant has shown a prima facie case with a probability of success.

The second condition is that 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. I note from prayer (c) of the plaint that the plaintiffs have claimed damages. They have also quantified what they perceive to have lost by October, 2005. These circumstances tend to suggest that the injury complained of may adequately be compensated by an award of damages.

For the above reasons, the balance of conveniences tilts in favour of the defendants. In any event, case law is replete with authorities to the effect that an interlocutory mandatory injunction is granted very sparingly and only in exceptional circumstances such as where the applicant's case is very strong and straight forward. In the instant case, some oral evidence, I think, will be necessary to establish the missing nexus between the 1st defendant and the second defendant. Until that link is provided, I would not say for certain that the 1st defendant is privy to breaching clause 7.1 of the share purchase agreement along with the 2nd defendant, even though I strongly suspect that to be the case.

In sum, I don't think that the orders sought should be granted at this stage. I accordingly decline to grant them. Being strongly suspicious however, that the mask worn by the 1st defendant will, in all probability, be unmasked in the arbitral process, I direct that costs of this application will be in the cause. I would urge the parties to submit themselves to that process with dexterity.

Dated and delivered at Mombasa this 4th day of August 2006.

L. NJAGI

JUDGE