

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Civil Suit 334 of 2004

RIFT VALLEY AGRICULTURAL CONTRACTORS (LTD).....PLAINTIFF

VERSUS

GITHAE & CO. ACCOUNTANTS.....1ST DEFENDANT

NYAMWAKA BOSIRE.....2ND DEFENDANT

RULING

On the 17th of December 2004, the plaintiff filed an application under a certificate of urgency under the provisions of **Order XXXIX Rules 2 and 3, Order L Rules 1 and 2 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act** seeking the order of this court that the defendants be compelled by an order of mandatory injunction to release the book of accounts, financial statements and other documents which came into possession of the defendants by virtue of their work as the auditors of the plaintiff company. The grounds in support of the application are stated on the face of the application. The gist of the said grounds is that the plaintiff having terminated the services of the defendants, required the books of accounts to be returned to it so that it could hand them over to Mssrs Ernst & Young, their new external auditors and tax agents. The plaintiff also wanted the books of accounts to be released to it so that it could take advantage of the tax amnesty which was then being offered by the Kenya Revenue Authority. The application is supported by the affidavit of Benson Thiru Karanja, a director of the plaintiff company. The application is opposed. The defendants filed grounds of opposition and a replying affidavit in opposition to the application filed by the plaintiff.

During the hearing of the application, Mr Karanja Learned Counsel for the plaintiff and Mr Machage, Learned Counsel for the defendants basically reiterated the contents of the affidavits filed and the annexures thereto. I have considered the submissions made. I have also read the affidavits filed in this case by the parties to this suit. The issue for determination is whether the plaintiff had establish on affidavit evidence that it is entitled to the orders of mandatory injunction sought. Having perused through the pleadings filed by the parties to this application, it is clear that the relationship between the plaintiff and the defendants covers a long period of time. The defendants have stated that they worked as auditors to the plaintiff for a period of over ten years. This assertion has not been disputed by the plaintiff. Now, the plaintiff has "*discovered*" that the defendants did not have the necessary credentials to be auditors of the plaintiff. Upon making this "*discovery*" the plaintiff then terminated the services of the defendants. The plaintiff then asked the defendants to release all the books of accounts that were in their possession. The defendants refused to release the books of accounts and the other financial statements that were in their possession. They stated that they could only release the said books of accounts if the plaintiff settles all their outstanding professional fees which in their estimate now stands at more than Kshs 5,000,000/-. The defendants were thus holding the said financial statements and books of accounts as a lien pending the settlement of the outstanding fees.

During the hearing of the application, it emerged that there was a dispute between the main shareholders of the company which had resulted in several suits being filed in the High Court, both in Nakuru and Nairobi. The aggrieved minority shareholder Mahesh Kumar Manibhai Patel filed an application seeking to be joined as a party to this suit. The plaintiff was not amused by this development. It confirmed the suspicion that the plaintiff had that the defendants were releasing confidential information contained in

the books of accounts to the said minority shareholder so that he could use the said information obtained to pursue the court case against it.

Having considered the arguments made for and against the release of the book of accounts, and having established that the only reason why the defendants were holding the financial statements and the books of accounts was as a lien for the payment of their professional fees, and considering that the plaintiff urgently wanted the books of accounts to enable it to take advantage of the tax amnesty, this court issued an interim order requiring the defendants to release the books of accounts to the plaintiff upon the plaintiff depositing a sum of Kshs 1,000,000/- either in court or in a joint interest earning account.

I have now carefully considered the arguments made. The principles governing the grant of mandatory injunction are now well settled. In **Kenya Breweries Ltd & Anor –versus- Washington Okeyo Civil Appeal No. 332 of 2000 (Nrb)** (unreported) it was held by the Court of Appeal at page 3 that:

“The test to grant a mandatory injunction or not is correctly stated in Vol. 24 Halbury’s Law of England 4th Edition 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 attempts to steal a march on the Plaintiff... a mandatory injunction will be granted on an interlocutory application.”

Also in Locabail International Finance Ltd –vs- Agroexport and others [1986] All ER 901 at page 901 it was stated:-

“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 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 that was required for a prohibitory injunction.

Applying the principles to this case, the plaintiff has not established that there exist special circumstances that would enable this court grant the mandatory injunction sought. The dispute between the plaintiff and the defendants over the professional fees of the latter appears to be longstanding. The plaintiff appears to be reluctant to pay the professional fees demanded by the defendants. When the tax amnesty was granted by the Kenya Revenue Authority, the plaintiff waited until the last possible moment before coming to this court to seek the orders of mandatory injunction. It appears that the plaintiff wanted to foreclose the professional fees disagreement that existed between it and the defendant by disavowing the professional credentials of the defendants. Unfortunately for the plaintiff, the allegation of professional misconduct cannot by stretch of imagination constitute a special circumstance especially where the professional relationship has been in existence for more than ten years. In my mind, the plaintiff wanted to unfairly take advantage of the tax amnesty to arm twist the defendants to release the book of accounts to it. The plaintiff had no intention whatsoever of taking advantage of the tax amnesty. Secondly from the number of documents annexed to the supporting affidavits sworn by the plaintiff and the defendant, the plaintiff’s case cannot be said to be *“a simple and summary one which can easily be remedied”*. The court will require to take evidence to establish the veracity of the opposing allegations made by the plaintiff and the defendants. In my view, this is not a suitable case for the grant of mandatory injunction. The plaintiff has not proved that it is entitled to the orders of mandatory injunction sought.

In the circumstances therefore the interim orders which were issued on the 20th of January 2004 are hereby set aside. The application filed by the plaintiff on the 17th of December 2004, lacking in merit is

hereby dismissed with costs.

DATED at NAKURU this 18th day of February 2005.

L. KIMARU

JUDGE