

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

Civil Suit 20 of 2005

MAHESHKUMAR MANIBHAI PATEL.....PLAINTIFF

VERSUS

RIFT VALLEY AGRICULTURAL

CONTRACTORS LIMITED.....1ST DEFENDANT

BENSON THIRU KARANJA.....2ND DEFENDANT

RULING

On the 1st of February 2005, the plaintiff Maheshkumar Manibhai Patel filed suit against the defendants herein praying for judgment to be entered against the defendants jointly and severally for an order of mandatory injunction to restrain the defendants from wasting or disposing of; selling or leasing out the 1st defendants movable and immovable assets as per the schedule attached to the plaint until the determination of two suits, namely, **Nairobi HCC Misc. No. 803 of 2004** and **Nairobi HCCC No. 45 of 2001** (*winding up cause*) filed against the defendants. The plaintiff further prayed for an order compelling the 2nd defendant to desist and or refrain from conducting the affairs of the 1st defendant without notifying or involving the plaintiff. Contemporaneous with filing the suit, the plaintiff made an application for an order of injunction under certificate of urgency. When the application was placed before this court on the same day, this court certified the application urgent and ordered that the same be heard *interparties* on the 15th of February 2005. This court further ordered that the plaintiff do serve the defendants with the application within three days of the 1st of February 2005 i.e. by the 4th of February 2005. As it later emerged, the plaintiff did not serve the defendants. By the 15th of February 2005, when this matter was listed for hearing, the plaintiff had not served the defendants. A further date was given by the court. This court ordered that the application be heard on the 1st of March 2005. The plaintiff had still not served the defendants by the said date with the application. The defendants using their own ingenuity obtained copies of the pleadings from the court file. They filed notice of preliminary objection to the entire suit.

In the said notice of preliminary objection, the defendants pleaded that the application was grossly incompetent, bad in law and an abuse of the court process. The defendants stated that the issues raised by the applicant in the application and the entire suit were the same issues raised in **Nairobi HCCC No. 45 of 2001** and **Nairobi HC Misc. Civil Application No. 803 of 2004**. The defendants further stated that the plaintiff had made an application dated the 17th of November 2004 in the said two suits which applications had been canvassed and were awaiting the ruling of the court. It was the defendant's view that the plaintiff ought to have moved the appropriate court in **Nairobi HC Misc Application No. 803 of 2004 and Nairobi HCCC No. 45 of 2001**. The defendants further stated that the plaintiff, in this suit, was guilty for not disclosing material facts. The defendants urged this court to strike out the suit filed by the plaintiff.

At the hearing of the preliminary objection, Mr Karanja Learned Counsel for the defendants reiterated the contents of the notice of preliminary objection. He submitted that the plaintiff had sought mandatory injunction in **Nairobi H.C. Winding Up Cause No. 45 of 2001 (Milimani)**. He further submitted that the plaintiff had sought orders of injunction in the said suit and in another suit filed at Nairobi, namely, **Nairobi HC Misc. Application No. 803 of 2004**. It is the same prayers that the plaintiff was seeking in this suit. According to the defendants, this suit was therefore filed in utter abuse of the due process of the court. He further submitted that the plaintiff had disobeyed this court's order that he should serve the

application within three days of filing the same. In the opinion of the defendants, this suit was filed for another purpose – that is, to harass and embarrass the defendants. The defendants therefore prayed that the preliminary objection be upheld and the suit be struck out with costs to the defendants.

Mr Mbiyu, Learned Counsel for the plaintiff opposed the preliminary objection. He submitted that in so far as the summons to enter appearance had not been served, it was not open for the defendants to raise the preliminary objection to the entire suit. In his view, the preliminary objection was raised prematurely. Learned Counsel submitted that the plaintiff could choose to ignore a court order which mandated them to serve the application within three days if it did not comply with the provisions of the law. He further submitted that the prayers sought in this suit were entirely different from the prayers sought in the two suits filed in Nairobi. He argued that one suit related to a winding up cause while the other was a petition by a minority shareholder seeking to protect his rights. He reiterated that this suit related to the preservation of the assets of the company pending the hearing and determination of the two suits filed in Nairobi. The plaintiff submitted that he had made full disclosure of the pendency of the two suits filed in Nairobi. The plaintiff denied that he had abused the due process of the court by filing this suit. He argued that he only sought to preserve the assets of the company during the pendency of the two suits filed in Nairobi. He urged the court to dismiss the preliminary objection.

I have carefully read the pleadings filed in this suit. I have also carefully considered the rival arguments made by the counsel for the plaintiff and the counsel for the defendants. The issue for determination by this court is whether the plaintiff abused the due process of the court by filing this suit in the pendency of two other suits filed in Nairobi touching on the same subject matter. It is not denied that the parties to this suit are involved in two other suits pending in Nairobi. One suit relates to a winding up cause and another is a petition by the plaintiff seeking to assert his rights as a minority shareholder. It is further not disputed that the plaintiff in this suit sought orders of injunction in the said two suits pending the hearing and determination of the winding up cause and the petition respectively. Now, the plaintiff argues that the prayers sought in this suit are different from the prayers sought in the two cases pending in Nairobi. According to him, this suit seeks to preserve the assets of the company pending the hearing and determination of the two suits filed in Nairobi.

This court initially wondered why the plaintiff did not deem it appropriate to seek the orders that he is seeking in this suit in the two cases pending in Nairobi. After hearing the arguments of the parties, it became apparent why the plaintiff filed this suit before this court knowing very well that there were two other suits pending in Nairobi over substantially the same subject matter. It is clear that the plaintiff had gambled that he would obtain *ex parte* injunctive relief when he appeared before this court on the 1st of February 2005. This court however ordered the plaintiff to serve the application upon the defendants. The order clearly specified that the said application should be served within three days from the date it was issued. The plaintiff did not comply with the order of this court. He did not serve the application upon the defendants. One month after the said order was issued, the plaintiff had not served the application upon the defendants. Were it not for the industry of the defendants in obtaining the copies of the pleadings from the court file, the defendants could not have been any wiser that a suit had been filed against them and further that the plaintiff had been ordered to serve them within three days.

I have perused the pleadings filed in the two Nairobi cases which were annexed to the affidavit in support of the plaintiff's application. I do hold that the matters in issue in the two Nairobi cases are substantially similar to the matters in issue in this application. The plaintiff sought prayers from this court while he was aware that the same prayers had been sought in the two Nairobi cases. I do agree with the defendants. This suit was filed in utter abuse of the due process of the court. The plaintiff was not seeking to have a dispute between him and the defendants adjudicated upon. If he was genuinely seeking to preserve the assets of the company, he should have made an appropriate application before the High Court in Nairobi where the two suits had been filed and are pending hearing and determination.

As it appears from the pleadings, the plaintiff had made such an application which is now pending for ruling. Maybe anticipating that the ruling of the court would go against him, the plaintiff gambled that he would obtain a favourable decision from this court. Unfortunately for him, his conduct amounts to an abuse of the process of the court. It is the worst form of forum seeking. It should be discouraged in the

strongest possible terms. The plaintiff's conduct after filing the said suit clearly manifests a person who does not submit to the authority of the court and further a person who is not prepared to follow the rules of the game in order to achieve justice. The plaintiff wanted to take unfair advantage of the defendants. He wanted to harass and embarrass them. In the process also the plaintiff failed to disclose material facts to this court.

In the circumstances of this case, I have no doubt that the plaintiff filed this suit for other purposes other than to seek the resolution of a dispute between him and the defendants. In the process the plaintiff ridiculed the due process of the court. I will uphold the preliminary objection. The application and the suit filed by the plaintiff is hereby ordered struck out. The defendants shall have the costs of the application and also the suit.

It is so ordered.

DATED at NAKURU this 13th day of May 2005.

L. KIMARU

JUDGE