



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA OF KENYA
AT NAIROBI (COMMERCIAL DIVISION – MILIMANI)
CIVIL CASE 66 OF 2004**

SHIRINKHANU AMIRALI SHARRIF PLAINTIFF

VERSUS

ALIBHAI SHARRIFF1ST DEFENDANT

ASHTON INVESTMENTS LIMITED 2ND DEFENDANT

MASKALLS LIMITED 3RD DEFENDANT

RAFIQ SULTANALI SHARIFF 4TH DEFENDANT

NOORDIN SULATANALI SHARIFF5TH DEFENDANT

FIROZ KABIRUDIN SHARIFF6TH DEFENDANT

GULZAR ABDULLA SHARIFF7TH DEFENDANT

SHAH PATEL & COMPANY8TH DEFENDANT

RULING

The Plaintiff on 2nd December, 2004 filed an Application by way of Summons in Chambers Seeking injunctive reliefs against the Defendants. The primary prayers were as follows:-

1.

2.

3. That a temporary injunction be granted pending the hearing of this case, restraining the First Defendant, its officers and agents from acting upon or giving effect to the resolutions passed at the general meeting of the 1st Defendant held on 30th July, 2004 or treating he said resolutions as having been validly passed or carried.

4) That a temporary injunction be granted pending the hearing of this suit restraining the 2nd Defendant from transferring its shares in the 3rd Defendant company.

5) That a temporary injunction be granted pending this suit restraining the Defendant from transferring its shares in its subsidiary companies.

6) That a temporary injunction be granted pending the hearing of this suit restraining the 3rd Defendant from transferring its franchise held directly by the Company or its

subsidiaries.

The Application was filed under a certificate of urgency and when it came before me on 2nd December, 2004 I certified the same as urgent and granted prayers 1, 2, 3, 4, 5 and 6 of the Application. Prayers 3,4,5, and 6 which were in respect of temporary injunction were granted for 14 days pending the hearing of the Application inter parties. These interim orders have been extended until the 6th of May 2005 when the 1st 2nd 4th 5th 6th and 7th Defendants through their Counsels sought order discharging the said interim orders of injunction.

On the said date i.e. 6th May 2005, Counsel for the Plaintiff had also moved the Court for the hearing of Chamber Summons dated 10th February, 2005 which Application sought leave to serve summons and all other necessary pleadings upon the 3rd Defendant company out of the Court's jurisdiction. There was no opposition to this prayer. I accordingly grant leave to the Plaintiff to serve summons and all other necessary pleadings in this suit upon the 3rd Defendant out of jurisdiction.

What was canvassed before me was therefore the prayer by the 1st 2nd 4th 5th 6th and 7th Defendants that the ex parte orders of injunction granted on 2nd December, 2004 be discharged. The ground for this prayer was that the Plaintiff had obtained the said orders by misrepresentation and non-disclosure of all material facts pertinent to the matter. The material that constituted the non-disclosure was the holding forth by the Plaintiff at the time she obtained the ex parte orders that the 3rd Defendant was a locally registered company. She made this averment in her original plaint which was filed simultaneously with the Application for injunction. In her supporting affidavit sworn on the 2nd December 2004, the Plaintiff listed the directors of the 3rd Defendant as the 4th Defendant, the 5th Defendant and the 6th Defendant and one Rasul Sharif. At paragraph 17 of the same affidavit the Plaintiff deposes that the directors of the 1st Defendant transferred or misappropriated the 1st Defendants reserve funds as gifts to themselves through companies owned by them and at paragraph 18 she deposed that the acquisition and financing of the 2nd and 3rd Defendants provides illustrations or best evidence of how she had been cheated out of returns on her investment in the 1st Defendant and the role played in the fraudulent scheme by the Defendants.

The Defendants seeking the discharge of the ex-parte orders believe that these averments by the Plaintiff at the hearing of the ex parte Application show material nondisclosures in that the Plaintiff at the time knew that the 3rd Defendant was not a locally registered company and that the directors are not as stated in her supporting affidavit. In the Defendants view the Plaintiff deliberately misled the Court for the sole purpose of obtaining the ex parte orders.

The Plaintiff on her part through her Counsel has argued that she did not deliberately mislead the Court and her only offence is one of misdescription of the 3rd Defendant. In her view the basis of the ex parte orders was the fraud which the Defendants had committed and which she maintained was still the position. She was also of the view that there was no doubt on the material availed to the Court that the Defendants had committed various offences and her basic position had not changed since the granting of the ex parte orders. She maintained that her misdescription of the 3rd Defendant could not amount to material non-disclosure. The Plaintiff urged me to maintain the orders granted in her favour on 2nd December 2004.

It is settled law that if an interlocutory injunction has been obtained by means of misrepresentation or concealment of material facts, the same will on the application of the party aggrieved be discharged. The issue for decision is therefore whether the injunction here was obtained as a result of misrepresentation or concealment of material facts.

When the Plaintiff presented her application on the 2nd December, 2004, her case was that the 3rd Defendant was a locally registered company. She even gave the names she swore were the directors of the 3rd Defendant. These directors were the 4th, 5th 6th Defendants and another according to the Plaintiff. She even deposed that these directors had transferred and misappropriated the 1st Defendant's reserve funds as gifts to themselves through companies owned by them. These same funds had been used to acquire inter alia the 3rd Defendant. These facts with respect to Counsel for the Plaintiff cannot be

described as mere descriptions of the 3rd Defendant. They are facts that in my view formed the core of the Plaintiff's case taken together with the other matters availed. Indeed these were the averments I considered along with other facts in granting the ex parte orders of injunction.

The Plaintiff's position has changed in my view drastically. She now says the 3rd Defendant is not a locally registered company. This is something she knew long before coming to Court on 2nd December, 2004. She may have misdescribed the 3rd Defendant as being locally registered. How about the directorships? Can she also say that that was a further misdescription? These are the directors she told me had transferred or misappropriated the 1st Defendants reserve funds and acquired the 3rd Defendant. These facts were crucial for the grant of the ex parte orders of injunction. If these facts have changed or were not true I have no doubt in my mind that the Plaintiff was not candid with the Court on 2nd December, 2004. Indeed it is obvious to me that if the Plaintiff had disclosed that the 3rd Defendant is not a local company and that the 4th, 5th and 6th Defendants were not directors thereof, I would not have made any orders against the 3rd Defendant.

All in all given the Plaintiffs antecedents, I am afraid she may not be a believer in forthrightness and has broken her contract with the Court.

In *The King –v- The General Commissioner for the purposes of the Income Tax Acts for the District of Kensington (1917) K.B. 486* it was held:

“If on the arguments showing cause against a rule nisi the Court comes to the conclusion that the rule was granted upon an affidavit which was not candid and did not fairly state the facts, but stated them in such a way as to mislead and deceived the Court there is power inherent in the Court in order to protect itself and prevent an abuse of its process to discharge the rule nisi and refuse to proceed further with the examination of the merits.”

The upshot of the above consideration of the Plaintiff's Application dated 2nd December, 2004 is that the ex-parte orders of injunction given on 2nd December, 2004 are hereby discharged.

The Plaintiff shall pay the costs of the 1st, 2nd, 3rd, 4th, 5th, 6th and 7th Defendants.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 15TH DAY OF JUNE 2005.

F. AZANGALALA

JUDGE

Read in the presence of:-

Onyancha for Oyatsi for the Plaintiff and Kyalo for Ngatia and for the 6th and 7th Defendant.

F. AZANGALALA

JUDGE

15.6.2005