Editorial Note

Injunction

- Mandatory
- Factors to take into account
- Substantive issues not to be determined until trial
- Injunctor to hand over NGO's items granted

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO 1322 OF 2003

ARID LANDS RESOURCE EXPLOITATION

AND DEVELOPMENT .... PLAINTIFF/APPLICANT

VERSUS

ABDULLAHI DADACHA

DIMA .... DEFENDANT/RESPONDENT

RULING

By an application brought under O 39, dated 15th December, 2003 the plaintiff which is a registered NGO under the Non- Governmental Organization Co-Ordination Act seeks three orders namely that the defendant be restrained from interfering with the management and functioning of the plaintiffs office and project at Sololo in Moyale District pending the hearing of the suit and that the defendant and his agents etc be comp0elled to release to the plaintiff, the plaintiff's assets including office keys, office files two motor bikes cash books, bank plates and cheque books in respect of two specified Bank Accounts at KCB Moyale Branch and that costs be awarded to the plaintiff .

The application is supported by the Affidavit of K G Guyo sworn on 12th January 2004.

The application is opposed and two affidavits both sworn by the defendant on 2nd January 2004 and 22nd January 2004 have been filed.

The application was canvassed before me on 2nd February 2004. The applicants grounds include:-

(a) That the defendants services as the plaintiff's coordinator have been suspended

(b) That the defendant as an employee has refused to handover plaintiff's assets and thereby making it impossible for the plaintiff to function in running the organization

. It is contended by the plaintiff/applicant that the defendants employment is contractual and is renewable every year and the defendants current contract prior to his suspension was due for review in January

2004. The office items are allegedly locked up in the Sololo office.

Two constitutions have been exhibited however it is claimed that the Constitution exhibited in the affidavit in support was a proposed Constitution that was never implemented. Instead it is the Constitution exhibited in the further supplementary affidavit and numbered WG 1(b) and bearing the signature of the Executive Director of NGO and registered in that office which is in force.On a prima facie basis this Constitution appears to be the applicable in view of the stamp from the NGO and its endorsement by the Executive Director and I believe this recognition by the NGO Bureau does sort out the difference by the parties concerning the applicable Constitution.

In order to resolve some of the issues raised it is important to consider the constitutional structure and the Management of the plaintiff.

Clauses 7:1 to 8.2 provide for the structure, with the Board of Director as the overall decision making authority. The Board shall have a lifespan of 4 years. Directors shall be not less than 3 and not more than 7. There is a provision for a Project Committee and that the Project Manager shall be the head of the NGO. The Board shall be appointed by the founding members. The quorum shall be 3.

The Board shall have power to hire and fire its staff. The Project Manager is said to be part of the senior staff. It is not denied that the defendant did work for the plaintiff as Project Manager and or a Project Coordinator as per the Constitution or as an employee of the plaintiff notwithstanding the absence of a contract of service .

The defendant contends that he was a founder member and not an employee. However on a prima facie basis all the exhibits reflect that he was an employee employed as a Project Coordinator. See Exhibits AB 6 and AB7 where the defendant recognises the existence of a Board and their overall responsibility over staff.

The plaintiff through its Board did meet on 24th November, 2003 and did resolve to suspend the defentant for interalia failure to account to the Board and usurping the role of the Board. The resolution was implemented vide a letter of 24th January 2003 to the defendant which suspended him. By a letter of the same date another officer was appointed as program Coordinator in an acting capacity.

The defendant claims that the Board did not have the power to suspend him because it had no quorum. On this issue the applicable Constitution and the letter dated 6th January 2003 from the NGO Bureau indicate that there were 3 directors as at 6th January 2003 (see AB 1)) and the meeting which passed the suspension resolution was attended by the same three directors. It is therefore quite evident that the Board did have the powers to suspend as per clause 8 of the Constitution.

In the two affidavits in reply the defendant has contended that he was properly performing his duties and that there was another Board in existence including that constituted by the Community. He has not however shown how a rival Board could be in existence and the Constitution which was invoked to bring in another Board and if such is the Board envisaged by clauses 7 to 8 of the Constitution.

In view of the above analysis the Court takes the prima facie view that under the Constitution a Project Coordinator or Project Manager is an employee and the Board does have the power to hire and fire him including the power to suspend.

While the Court is conscious of the fact that at this stage of the proceedings it cannot finally adjudicate on any issue this being the function of the trial court on the basis of the evidence produced by way of affidavit evidence the requirements for the grant of interlocutory injunction have been satisfied by the plaintiff

(a) He has established a prima facie case with a probability of success

(b) It will suffer irreparable damage and that in the circumstances damages would not be an adequate

remedy. In view of the constitutional provision requirement (a) is fully satisfied.

As a NGO its operation could be irreparably stalled and the social worth of the project lost forever by the defendant is failure to hand over its office keys, books of accounts cheque books and that the court needs not look into the balance of convenience, because requirements (a) and (b) above have been met.

And even if the Balance of convenience were to be considered it tilts heavily in favour of the plaintiff and its Board to continuing the operations of the plaintiff. – see **GIULLA v CASSSMAN BROWN (1973) EA 358.**

The authorities cited to me by the learned Counsel for the plaintiff on employer/employee relationship do not apply because there has not been any termination of the employment so far.

The authorities are however good to the extent that they show that an employer/employee relationship cannot be forced to persist by one party as against another since damages would be an adequate remedy in the event of breach. I would thereafter cite them for that purpose only

1. ALFRED J GITHINJI v MUMIAS SUGAR COMPANY LTD CA 194 of 1991 (unreported)

2. DALMAS B OGOVE v KNTC LTD CA 125 of 1996 – unreported 194.

"The only remedy for wrongful dismissal is damages"

In the special circumstances of this case employer/employee I consider it proper and just to grant orders 2 and 3 of the application as prayed pending the full hearing on merit concerning the substantive issues of whether or not the suspension was proper and whether or not the defendant was an employee.

Orders are therefore granted on the same principles as were set out in the case of BELLE MAISON v YAYA TOWERS HCCC 2225 of 1992 by Bosire J as he then was.

In the case of SHITAKHA MWANODO & 4 OTHERS [1996] klr 445 the Court of Appeal held:-

"1. The principle applicable in deciding whether or not to grant a temporary injunction are stated in GIELLA v CASSMAN BROWN & CO LTD [1973] EA 358. The principles are that the applicant must establish a prima facie case with a probability of success show that he will suffer irreparable harm which cannot be adequately compensated by an award of damages and if the court is in doubt it should decide the application on the balance of convenience.

" 2. The balance of convenience tilts in favour of the respondents. In granting the injunction the court would be imposing the applicant upon the organization hence occasioning it hardship. The harm to the applicant arising out of the failure to grant the injunction can be adequately compensated by damages." "

3. The court should not decide substantive issues at the interlocutory application stage. This ought to be left for trial.

In the case of **YEGO v TUIYA ...** [1986] KLR 726 It was held by the Court of Appeal that it was wrong for a judge to make a mandatory Order as it may have the effect of finally disposing of the suit. In the case the judge had granted an eviction order which had not been sought. The situation here is different from Yego above.

Failure to grant the order at this stage would result in the destruction and total paralysis of the project in question which from the documents presented appear to have considerable social and community value in the Northern Eastern Province. Handing over of the assets, books, plates and cheque books would not in the view of the court determine the substantive issues.

In the result the respondent is stopped from interfering with the project and also ordered to release to the plaintiff items as per prayers 2 and 3 of the application.

Costs of this application are awarded to the applicant.

DATED and delivered at Nairobi this 26th day of February 2004.

J G NYAMU

JUDGE