



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (MILIMANI COMMERCIAL COURTS)**  
**Civil Misc 724 of 2003**

**PAMELA KARIMI RIUNGU..... 1<sup>st</sup> APPLICANT**

**Q & Q EMPORIUM LIMITED..... 2<sup>ND</sup> APPLICANT**

**AMNERIS INTERIORS LIMITED..... 3<sup>rd</sup> APPLICANT**

**-VERSUS-**

**GIORGIO GUERRATO..... 1<sup>st</sup> DEFENDANT**

**RULING**

The matter before court is a preliminary objection to the

hearing of two applications dated 12<sup>th</sup> September, 2003 and 6<sup>th</sup> October, 2003, both of which were listed for hearing on 20<sup>th</sup> January, 2003. A brief history of the antecedents to the preliminary objection will help to bring the matter into context.

The plaint in this suit is dated 12<sup>th</sup> September, 2003. Filed contemporaneously with the plaint, the plaintiff also filed a Chamber Summons dated 12<sup>th</sup> September 2003 inter alia, under, O.XXXIX rule 2 of the Civil Procedure Rules, section 3A of the Civil Procedure Act,

and O.XXXVIII rule 1(a)(ii) and (b) of the Civil Procedure Rules. The chamber summons prays for orders;

- (a) that the application therein be certified urgent and heard ex -parte in the first instance and during vacation;
- (b) that the defendant be restrained by himself, servants and or agents from dealing in any manner whatsoever with any property belonging to the second and third defendants, or entering into any of the premises of the companies aforesaid pending the hearing of this suit and/or further orders of this court;
- (c) that a warrant of arrest do issue against the defendant to bring him to court to show cause why he should not furnish security for his appearance;
- (d) that it be endorsed that any violation of any order issued by the court will result in punishment for contempt of court; and;

(e) that the costs of the application be provided for.

The application is based upon the annexed affidavit of the first plaintiff and such other grounds as may be adduced.

The matter came before the Hon. Justice Kariuki on 16<sup>th</sup> September, 2003. In the peculiar circumstances of this case, the learned judge granted a temporary injunction for a period of 14 days in terms of prayer (b) pending inter partes hearing. He also granted prayer (c) and issued a warrant to arrest the defendant to bring him to court to show cause why he should not furnish security for his appearance, provided that if the defendant pays into court three million shillings to be specified in the warrant as sufficient to meet the claim, he would not be arrested.

On 24<sup>th</sup> September, 2003, the matter came for inter partes hearing before the same judge. By consent of counsel for the respective parties, the requirement for defendant to deposit Sh.3 million was suspended until the 7<sup>th</sup> October, 2003 when the application would be heard inter partes; the defendant was required to deposit his passport with the court and execute a bond for his appearance; an inventory of the goods would be taken on 25<sup>th</sup> September, 2003 at 2.30pm under the supervision of the court bailiffs; and the restraining orders to remain in place until 7<sup>th</sup> October, 2003.

On 7<sup>th</sup> October, 2003, the advocates for the defendant filed a chamber summons dated 6<sup>th</sup> October, 2003, under ss.3A, 63(e), 64(9) of the Civil Procedure Act, O.XXVIII Rule 3, O.XXXIX Rule 4 of the Civil Procedure Rules, the inherent powers of the court and all the other enabling powers and provisions of law. The application prays for orders.

- (i) that this matter be certified urgent
- (ii) that service of the application be dispensed with in the first instance
- (iii) that the ex parte orders granted by this court on 12<sup>th</sup> September be discharged or set aside, and
- (iv) that the costs of this application be provided for The application is premised on the grounds that the said application {sic} had been obtained on the basis of incomplete facts; the applicants failed to disclose material facts to the court; the applicant had not been frank and candid to the court, and the annexed affidavit of the defendant. When the matter to court on 7<sup>th</sup> October, 2003, by consent, it was stood over to 22<sup>nd</sup> October, 2003 for hearing, and orders were extended, including the bond, to 22<sup>nd</sup>

October, 2003. The parties were also granted leave to file further affidavits.

On 22<sup>nd</sup> October, 2003, the matter came before the Hon. Justice Kariuki when, by consent of the parties, the court made an order in the following terms-

1. THAT inventory of all the assets and liabilities of Q and Q Emporium Ltd be taken by the first plaintiff and the defendant
2. THAT the assets of Q and Q Emporium Ltd. be liquidated to offset the liabilities of Q and Q Emporium Ltd.
3. THAT the balance available after payment of debts be shared amongst the shareholders of Q and Q Emporium proportion to their shares.
4. THAT in the meantime the defendant in conjunction with the first plaintiff be permitted to run the business of Q and Q Emporium Ltd., which shall include the closing down the town show room.
5. THAT the first plaintiff shall have access to the said business and books of account.
6. THAT the parties herein be at liberty to instruct any person to assist in the aforesaid exercises.
7. THAT upon completion of the aforesaid accounting exercise and setting of accounts the plaintiff shall transfer her shares in Q and Q Emporium Ltd to the defendant
8. THAT the third plaintiff do assign forthwith its lease in the warehouse to G. Arreda Ltd. subject to the landlord's approval.
9. THAT the liabilities arising out of claims from the employees of the Amneris Ltd. to be borne by the defendant
10. THAT the matter to be mentioned on the 5<sup>th</sup> of November, 2003.
11. THAT in the event of difficulties in enforcing these terms, there shall be liberty to either party to apply.
12. THAT the defendant's bond be extended to 5<sup>th</sup> November, 2003.

The court made an order in terms of the above consent by the parties. At the mention on 5<sup>th</sup> November, the case was transferred to

Milimani Commercial Court, where it was mentioned before the Hon. Justice Ibrahim on 14<sup>th</sup> November, 2003. the learned judge ordered that the hearing of both applications dated 12<sup>th</sup> September, 2003 and 6<sup>th</sup> October, 2003 be heard on 28<sup>th</sup> November, 2003. When the applications came for hearing before Justice Ringera on 28<sup>th</sup> November, 2003, the matters could not proceed and the learned judge repeated the order made by Justice Ibrahim to the effect that both applications be heard on 20<sup>th</sup> January, 2004.

On 19<sup>th</sup> January, 2004 a day before the scheduled hearing on 20.1.04, the plaintiffs filed a Notice of Motion of the same date, seeking orders that the court be pleased to compel the defendant/respondent to comply with the consent orders recorded on 22<sup>nd</sup> October, 2003, and that the costs of that application be provided for. At the hearing on 20<sup>th</sup> January, 2003, Mr. Nyakundi counsel for the plaintiffs, rose to raise what he called preliminary points. He referred to the consent orders made on 22<sup>nd</sup> October, 2003, and submitted that these constituted some sort of a contract which compromised not only the action, but also the applications which were supposed to be heard on that day.

Pursuant to that consent, he argued, the control of the businesses was vested in the defendant and he took advantage of that control to further his personal interests which was what the defendant had all along been trying to do, and what the plaintiffs had been complaining about. Clause 11 of the consent order gave parties the liberty to apply in the event of any difficulties, hence the application dated and filed on 19<sup>th</sup> January, 2004. Even though there was an order for hearing of the two applications filed last year, Mr. Nyakundi maintained that the plaintiffs were entitled to raise issues of noncompliance with the consent order of 22<sup>nd</sup> October, 2003, before the hearing since they involve fairness and justice, due process and abuse of the process of the court, all of which are fundamental to the jurisdiction of this court. In January, he said that whereas the first plaintiff has complied with the court order, the defendant has not complied as he has failed to give an account as required.

In response, Mr. Wandabwa, for the defendant, stated that it was unfair for his colleague to file an application just the day before, serve it at 4.00pm, and seek to argue it without giving counsel for the defendant some reasonable time.

He also said that counsel for the plaintiffs had not filed any notice of preliminary objection which objection he was now trying to argue. To the extent that that application is premised on facts, it cannot lie as preliminary objections are premised on matters of law.

As for the accounts he said that the parties had opened the premises and taken a joint inventory, and therefore the plaintiffs can't seek an account of that which they have. He also contended that it was the defendant, rather than the plaintiffs, who had been pushing for the accounts as evidenced by the correspondence between the parties. The defendant had already given the plaintiffs the books relating to the one period during which the defendant had been managing the business. By raising a preliminary objection, counsel continued, the plaintiffs were only bogging down the application from being heard, and yet the hearing dates for both applications were taken by consent. Such a course cannot be by way of a preliminary objection, which is merely intended to impede the hearing of those applications. He concluded by saying that the preliminary objection should be dismissed.

In a short reply, Mr. Nyakundi said that those applications were extended by that consent order, and that this was the proper forum to agitate those preliminary points.

After hearing the respective submissions of both counsel, the court was of view that Mr. Nyakundi's perception of preliminary points differed from that of Mr. Wandabwa. The two of them were not ad idem on that issue. Mr. Wandabwa understood Mr. Nyakundi to raise a preliminary objection in its orthodox sense. If that be the case, I would not hesitate to rule that what constitutes a genuine preliminary objection is a pure point of law which, if successfully taken, has the effect of disposing off the entire suit or application altogether. Looking at all the incidents of the applications before the court, I don't think that Mr. Nyakundi's preliminary points should have that effect.

Firstly, on two different occasions, two different judges have ordered that both the applications dated 12<sup>th</sup> September, 2003 and 6<sup>th</sup> October, 2003 be heard on specific dates given by those judges. On 14<sup>th</sup> November, 2003, Justice Ibrahim ordered that both applications be heard on 28<sup>th</sup> November, 2003.

On that day, the two applications came for hearing before Justice

Ringera. Unfortunately, Mr. Nyakundi had been asked to go to the

P.I.C. in connection with the Eurobank affair, and therefore both

counsel suggested that the applications be heard on 20<sup>th</sup> January, 2004. The court therefore ordered that the two applications be heard on that day. The remarkable feature about this date is that it was taken by consent of both counsel, which is a second reason why the points raised by Mr. Nyakundi should not have the effect of disposing off the two applications.

Thirdly, the consent order was made on 22<sup>nd</sup> October, 2003.

When the matter came before Justice Ibrahim on 14<sup>th</sup> November, 2003, that consent was given only a passing reference when Mr.

Wandabwa said-

"...The parties had entered into some consent. There was liberty to apply in the consent. The parties are trying to adhere but there is fear that the parties may not agree..."

Mr. Nyakundi's response was that this was the position. And

when the matter came before Justice Ringera on 28<sup>th</sup> November, 2003

the consent order was still in force, and yet, it was not even

mentioned this time round.

Between 28<sup>th</sup> November, 2003 and 19<sup>th</sup> January, 2004 when Mr. Nyakundi filed what I shall call the plaintiff's second application, which is the third application on record, nearly a month had elapsed. The application was filed the day before the date of hearing of the applications. This timing might suggest that the intention behind that application was to scuttle the hearing of those two applications altogether. Technically, but only technically, these observations don't add any value to Mr. Nyakundi's preliminary points.

Having said that, it is equally clear to me that the consent order dated 22<sup>nd</sup> October, 2003, is too important to be ignored. I agree with Mr. Nyakundi that this order has, to a very large extent, compromised the suit and the applications which are supposed to be heard. Some of the prayers in those applications are already spent. Looking at the plaintiff's first application dated 12<sup>th</sup> September, 2003, for instance, prayer (a) for the application to be certified urgent and heard ex parte in the first instance and during the vacation is spent; prayer (b) is compromised by the consent order of 22<sup>nd</sup> October, 2003; prayer (c) for the issue of a warrant of arrest against the

defendant is spent; granting prayer (d) on disobedience of court orders is stating the obvious, and prayer (e) on costs is routine.

With regard to the defendant's application dated 6<sup>th</sup> October, 2003, prayers (i) and (ii) on certification of

the matter as urgent and dispensing with service of the application in the first instance are spent. Prayer (iii) is for an order that the ex parte orders granted by this court on 12<sup>th</sup> September be discharged and or set aside. A scrutiny of the court record shows that there were no orders made on 12<sup>th</sup> September, 2003.

In spite of the above shortcomings, both counsel must be commended for their magnanimity in recording consent orders time and again, which orders have brought the issues between the parties to near settlement. This has been brought about especially by the consent order of 22<sup>nd</sup> October, 2003. That order cannot be ignored without losing valuable ground towards a solution of the differences between the parties. In order to progress this matter, it is imperative that the consent orders be complied with. An audit of that order should be taken with a view to ascertaining what has been accomplished and what remains to be done.

If there are any outstanding issues in the application dated 12<sup>th</sup> September, 2003, let these be taken up in the context of the order of October 22<sup>nd</sup>. Then all the three applications should be argued together. I think that that is the best way to forge forward in this matter.

It is so ordered.

I make no order as to costs.

Dated and delivered at Nairobi this 5<sup>th</sup> day of February 2004

L.NJAGI

JUDGE