



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA NAIROBI
COMMERCIAL DIVISION, MILIMANI
CIVIL CASE NO. 557 OF 2004**

FOXTROT CHARLIE INC.APPLICANT

VERSUS

AFRICA AVIATION HANDLERS LTD.1ST DEFENDANT

RAPHAEL MULLEI NZOMO2ND DEFENDANT

PATRICIA NZULA NZOMO3RD DEFENDANT

RULING

This ruling relates to the Plaintiff's application by way of a Chamber Summons dated 12.10.2004 and filed in Court on 14.10.2004. The application was brought under a Certificate of Urgency and the Hon. Mr. Justice Waweru directed that it be heard inter parties on 21.10.2004. In the event the application was not heard on that date, but was on 11.11.2004. In the application, the Plaintiff seeks the orders following:-

1. ...spent
2. ...spent
3. ...spent
4. a temporary injunction restraining the Defendants by themselves, their servants or agents or otherwise from howsoever interfering with, altering, terminating, revoking or otherwise howsoever breaching or further breaching the Plaintiff's position as Director of the First Defendant pending the hearing and determination of this suit.
5. A temporary injunction that the third Defendant, her agents, servants or otherwise from purporting to act as a director of the First Defendant pending the hearing of this application.
6. That the status quo prior to 27.08.2004 be maintained by all parties pending the determination of the suit.
7. A temporary injunction restraining the Defendants by themselves, their servants or agents or otherwise from howsoever breaching or further interfering or otherwise contravening the Partnership Agreement dated 20.12.2002 pending the determination of the arbitration proceedings.
8. A temporary injunction restraining the Defendants by themselves, their servants or agents or otherwise from denying the Plaintiff exclusive use of the traffic on Johannesburg-Nairobi and Nairobi-Europe routes and operational support in Nairobi pending the determination of the

arbitration proceedings.

9. A temporary injunction restraining the Second Defendant, by himself, his servants or agents or otherwise howsoever breaching Article 4 of the Partnership Agreement by transferring, alienating, pledging or in any manner whatsoever dealing with the Second Defendant's 15% Shares in the First Defendant pending the determination of the arbitration proceedings.

When this matter was urged, Miss Janmohamed, counsel for the Plaintiff/Applicant reiterated the grounds in support of the Application, and these are :-

1. The Plaintiff is a shareholder and a Director of the First Defendant.
2. By a letter dated 27.08.2004, the Defendants purported to remove the Plaintiff as a director of the First Defendant in breach of the law and Memorandum and Articles of Association of the First Defendant and also to unilaterally terminate the Partnership Agreement dated 20.12.2004.
3. The Defendants had not consulted the Plaintiff in reaching the above decision and to the conduct of the first Defendant's business and the Defendant's acts are oppressive to the Plaintiff.
4. The Defendants are interfering with the Plaintiff's business and are attempting to procure third parties to withhold payments, reports or returns to the Plaintiff;
5. As a consequence of the foregoing acts of the Defendants the Plaintiff stands to suffer irreparable loss and damage which cannot be remedied by an award of damages... and
6. The Plaintiff has commenced arbitration proceedings in Geneva, Switzerland in accordance with the rules of the International Chamber of Commerce, in terms of Article 6 of the Partnerships Agreement and the Plaintiff apprehends that unless the interim injunctive reliefs are granted the decision of the arbitration panel will be rendered nugatory.

To this application the Defendants filed on 19.10.2004 the following grounds of opposition: -

- a) The orders sought cannot be granted as the Applicant is seeking a mandatory order in the guise of a temporary injunctive orders;
- b) The Court cannot grant an order for status quo prior to 27.08.2004 to be maintained as this will amount to issuing a mandatory order;
- c) The application does not satisfy the conditions for a grant of a mandatory order;
- d) The application does not satisfy the conditions set out in ht case of CASSMAN BROWN for grant of a temporary injunction.
- e) The application is incompetent.

In addition to the grounds of opposition, there also was sworn and filed on 19.10.2002 a Replying Affidavit expressed to be made on **behalf of the 1st and 2nd Defendants** by Raphael Mullei Nzomo in which the 1st and 2nd Defendants admit and acknowledge that:-

- (i) The Partnership Agreement was signed (but deny the date of signature as being 20.12.2001) and accuse the Plaintiff of mala fides in inserting that date (paragraph 3),
- (ii) The Plaintiff was to acquire 15% of the share capital in the 1st Defendant; but that not free of charge (paragraphs 4 and 17 (b).);
- (iii) Notification of changes in the directorship of the 1st Defendant by letter of 27.08.2004

(paragraph 5);

(iv) Purported removal of the Plaintiff from the Board of the 1st Defendant by a Memorandum drawn and signed by the 2nd Defendant lone of 23.08.2004 (paragraph 8);

(v) he has made interim Returns notifying the Registrar of Companies of the changes in the directorship of the 1st Defendant (paragraph 9)

and makes further averments which are not material for the purpose of this Ruling except the averment in paragraph 15 which is as follows -

"15. That in further Reply to paragraph 14 of the Supporting Affidavit I wish to state that in view of the provisions of the law and specifically the Civil Aviation Act (Cap 394), Laws of Kenya, I am advised by my Advocate and verily believe it to be true that an agreement purporting to assign or grant exclusive traffic rights of a Licence issued to a Licensee to a third party would be against Part IV Rule 24 of the Act, and to that extend is unenforceable in Kenya. The Licence in this case was issued to the 1st Defendant and cannot be assigned. Annexed hereto and marked page 8 is a copy of the letter."

In paragraph 17, the 2nd Defendant makes further averments on advice of his Advocate on the law -

(a) That the Partnership Agreement is unenforceable being in breach of the provisions of the Civil Aviation Act Cap. 394 of the Laws of Kenya.

(b) ... in so far as the 15% shares to be transferred the contract thereto is null and void for want of consideration.

(c) The entire Partnership Agreement between the Plaintiff and the 1st Defendant is null and void for want of consideration.

(d) The whole application is incompetent and lacks merit for the reasons that the Plaintiff is seeking a mandatory order. The Principles for grant of a mandatory order have not been satisfied.

(e) The Plaintiff had not satisfied the conditions for grant of an injunction order.

When his application was urged before me on 11.11.2004, Miss Janmohammed Counsel for the Applicant relied upon the provisions of the Partnership Agreement dated 20.12.2001 (according to the Supporting Affidavit of Daniel Gatmon, but disputed by the 2nd Defendant). Be it as it may, the 2nd and 3rd Defendants admit that the agreement was signed, except they say, it was no contract, it lacked consideration, and is therefore unenforceable - they are advised, it is null and void. This is however not the concern of this Ruling. It is not also the concern of this Ruling whether or not the 15% shares referred to in Article 4 of the Agreement were transferred to the Plaintiff. M/s Janmohammed Counsel for the Plaintiff emphasized that this was a subject of a different forum namely arbitral proceedings to be commenced in Geneva in accordance with Article 6 of the Agreement, that all disputes arising out of the Agreement would be finally settled under the Rules of Conciliation of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said rules. This Ruling concerns the Plaintiff's major complaint, firstly that the 2nd defendant has purported to remove the Plaintiff from the Board of the 1st Defendant in breach of the Partnership Agreement, and secondly, contrary to the provisions of the Companies Act Cap 486 Laws of Kenya, and in particular section 201 thereof and that for these reasons, and pending the determination of the suit, the Defendants be enjoined from perpetuating these unlawful acts against the Plaintiff.

Commencing with the Partnership Agreement, it does not actually provide for appointment of the Plaintiff as Director. The Plaintiff acquired the directorship following the transfer for presumably a consideration of 200 shares hitherto held by James Ratiri K'Owade to the Plaintiff. Out of the total of 500 shares issued the Plaintiff holds 200 shares and the 2nd Defendant hold 300 shares. The actual

incorporation shares as at 14.12.1998 were 255,000 to Raphael Mullei Nzomo and 245,000 shares to James Ratiri K'OWade. It appears these were later reduced to 200 shares to Foxtrot Charlie Incorporated (the Plaintiff) and 300 to Raphael Mullei Nzomo as at 2.04.2002. Be it as it may this gives the 1st Defendant an edge of 100 shares or 3/5 of the company and 2/5 of the company belongs to the Plaintiff. Miss Janmohammed urged the Court to find that even if this being so, the 2nd Defendant does not have the liberty nor the power to remove the Plaintiff from the Board of the Company, (1st Defendant) without reference to the Plaintiff, even if he were a minority shareholder. Counsel relied upon the provisions of Article 16 of the Articles of Association which provide as follows -

16 (a) Unless and until otherwise determined by the company in General meeting, the directors of the Company shall not be less than two (2) nor more than five (5) in number. The first directors shall be appointed in writing by the subscribers to the Memorandum of Association.

(b) The quorum necessary for the transaction of the business of the Directors may be fixed by the Directors, and unless so fixed shall be three (3)

Article 15 of the Articles of Association sets out procedures for proceedings of directors. They may meet together for the despatch of business or adjourn, and otherwise regulate their business as they think fit. Questions are determined by majority vote, and the Chairman has a second or casting vote. A director is entitled to notice unless he is absent from Kenya.

Ms Janmohamed, Counsel for the Plaintiff cited Section 201(2) (b) of the Companies Act aforesaid that the Plaintiff being a corporation was entitled to be a director. There is I think no dispute about this. The dispute lies in the provisions of Article 21 of the 1st Defendant's Articles of Association which provide as follows:-

21. The holders of a majority in nominal value of the issued share capital for the time being of the company may at any time and from time to time by memorandum in writing signed by them and left at the Registered office for the time being of the company, or the company in General Meeting:-

(a) Remove any Director from office,

(b) Appoint any person to be a director either to fill a casual vacancy, or in addition to the existing Board, but so that the total number of Directors shall not at any time exceed the maximum number fixed by or in accordance with these Articles. Any director so appointed shall hold office until he is removed or his office is vacated under Regulation 88 of Table "A".

This is the Article upon which the 2nd Defendant relied upon in the purported exercise of his majority shareholding in the 1st Defendant, and this is the provision upon which Mr. Katiku relied in his submissions to the Court. I am of the firm opinion that the 2nd Defendant, could not, notwithstanding the apparent power donated to him by Article 21 of the Company's Articles of Association exercise such power without reference to the Plaintiff. It is common knowledge that the Articles of a Company constitute its constitution for the proper and lawful management of the business of the Company. Those powers will not however be exercised without reference to the general corpus of the law governing the proper management of a company This general body of company law is two fold:

(1) Firstly, the affairs of a company must not be managed in an oppressive manner, or at the caprice of a dominant or majority shareholder.

(2) Secondly that for every action proposed to be taken by any arm of the company be it the shareholders or a director(s) a company the other arm likely to be affected whether beneficially, and more so adversely, must be informed or be given prior notice of the proposed or intended action or resolution. If this is not done the party or parties adversely affected or to be affected are at liberty to bring action or petition the Court under Section 211, for orders inter alia that the

Company's affairs are being conducted in manner oppressive to the minority shareholder.

This is a cardinal tenet for persons associating together in business with a view to making profitable their joint venture. For one party or group to purport to act unilaterally is a perversion of that general tenet and it is immaterial that the action proposed to be taken or taken is purported to be in compliance with some piece of legislation. That ground alone should be a greater reason why the other party or group should be advised of the impending action or in this case, resolution or memorandum for removal from the Board of the 1st Defendant. The information or notice must precede the proposed action and will not be **ex post facto** after the event like in this case. The Court of equity which softens the law, will not allow it.

In the case of **CLEMENS vs CLEMENS BROS. & ANOTHER [1976] 2 ALL E.R. 268**, the Plaintiff held 45% and her aunt held 55% of the issued capital of a family company. The plaintiff was not even a director but the aunt was. The aunt with other directors sought to pass resolutions to increase the capital of the company so that the Plaintiff's shareholding would be reduced to 25%, and thus ensure that she would never gain control of the company. The aunt went ahead and voted for the resolutions increasing the capital of the company to the detriment of the Plaintiff. The Plaintiff filed an application against the Company and the aunt, seeking a declaration that the resolutions were oppressive of the Plaintiff and an order setting them aside. Upon the Defendant's contention that if two shareholders both honestly held different opinions, the view of the majority should prevail, and that the shareholders in general meeting were entitled to consider their own interests, and to vote in any way they honestly believed proper in the interest of the company – the Court held that:-

“(1) The aunt was not entitled as of right to exercise her majority vote as an ordinary shareholder in any way she pleased, her right was subject to equitable considerations which might make it unjust to exercise it in a particular way.

(2) although it would not be disputed that she would like to see the other directors have shares in the company and a trust set up for long service employees, the inference was irresistible that the resolutions had been framed in order to put complete control of the company into the hands of the aunt and her fellow directors to deprive the Plaintiff of her existing rights as a shareholder with more than 25% of the votes and to ensure that she should never get control of the company. Those considerations were sufficient in equity to prevent the aunt using her votes as she had, and the resolutions would accordingly be set aside.

Further, and although that finding must ultimately lie with the trial judge, Counsel for the Defendants relied upon the provisions of Regulations 24 of the Civil Aviation (Licensing of Air Services) Authority Rules which says:-

“24. A license shall not be capable of being transferred or assigned [Except as provided in the said rule],”

Katiku, Counsel for the Defendants sought to rely on this provision in support of the Defendant's contention that the Partnership Agreement was an assignment of the Air Licence No. 0125 issued on 21.06.2004 by the Kenya Civil Aviation Authority. Even if this Agreement were read and interpreted in the worst possible bad faith it is incapable even remotely, of being regarded as an assignment of the Air Service Licence Serial No. KCCA/LAC/0125 of 21.06.2004. All that the Agreement provides for is in effect the pooling of resources and capacities which the Plaintiff, and the 1st Defendant have. The Plaintiff has ability to provide cargo capacity in Aircraft between African and Europe, and the 1st Defendant the Air services Licence which together complement other. There is no way this complementation could be regarded as an assignment of the Air Services Licence or be contrary to Regulation 24 of the said Regulations.

In essence therefore, the 2nd Defendant, has breached the terms of the Partnership Agreement, and terms of the Articles of Association. He cannot act oppressively against the Plaintiff's

interest, and make the company sound as if it was a family interest of husband and wife or brother and sister in total disregard of the Plaintiff's equity in the Company, 1st Defendant. In my view, the Plaintiff has established a prima facie within the trilogy of the case of *Giella vs Cassman Brown & Co. Ltd* [1973] E.A. 358.

The second leg of the *Giella vs. Cassman Brown* case is that the Plaintiff will suffer irreparable loss and damage unless the injunction is granted.

The Plaintiff has pleaded that the Defendants had not only withheld payments due to them, but had also advised other third parties to do the same and that these acts of the Defendants threaten to cause irreparable loss and damage in its business unless the Defendants are restrained by injunction. The Plaintiffs further aver in paragraph 10 of the Supporting Affidavit of David Gatamon that protests by the Plaintiff's Advocates against the Defendant's unlawful and illegal actions had not yielded any favourable response from the Defendant's Advocates.

I am satisfied that these averments coupled with the Defendant's purported removal of the Plaintiff from the Board of the 1st Defendant are most likely to cause the Defendants serious loss and irreparable damage which the Defendants from their unilateral actions will not most probably be able to compensate the Plaintiff in damages. The Plaintiff has in my view met the second principle of the *Cassman Brown* case that damages would not be an adequate remedy in this matter. I have no doubt that the balance of convenience would also be in favour of the Plaintiff.

In their grounds of opposition, the Defendants attack the Plaintiff's application that it seeks a mandatory injunction in the guise of an interlocutory injunction. This is indeed so for the acts complained of have been done, they cannot now be restrained by way of a interlocutory injunction. Can this Court then grant such a mandatory injunction? I have no doubt again, it can, but not under the provisions of Order XXXIX of the Civil Procedure Rules, for this application does not stand either in rules 1, 2 or 3 thereof.

In the case of **BELLE MAISON LIMITED vs YAYA TOWERS LIMITED (H.C.C.C No. 2225 of 1992)**, Bosire J (as he then was) held that the Court has jurisdiction to grant a mandatory injunction at an interlocutory stage referring to the case of **ADONIA vs. MUTEKANIA [1970] E.A. 429** where the Court of Appeal held that where there is no specific provision under which a party may move the Court for a remedy, the party concerned may come to Court under Section 97 of the Civil Procedure Act (now S. 3A of the Civil Procedure Act) and seek relief. It is however a jurisdiction which must be exercised only in special circumstances. Special circumstances however depend on the facts and circumstances of each case and the good sense of the trial judge – (the *Despina Pontikos* [1975] E.A. 38), I pose as did Bosire J (as he then was) in that *Belle Maison Ltd vs. Yaya Towers Ltd* (supra), do special circumstances exist in this case to warrant the grant of a mandatory injunction. The rival parties think differently. The Plaintiff says circumstances exist which warrant the grant of that remedy, the Defendants think otherwise. I think such circumstances exist in this case.

Kenya is situate in a critical web of aviation and commerce in this region. Kenya businessmen are trading in the international arena both in goods and services. Where they enter into joint ventures whether among themselves or with foreign capital venturers, they must be taken to understand not only the importance but also the sanctity of the agreements or instruments they enter into.

The Courts of Kenya will therefore in appropriate circumstances give effect to those instruments and agreements so as to give life and meaning to them, and a measure of predictability as to the proper application of law where those instruments are threatened with violation or are violated whether by citizen businessmen of Kenya or by their joint venturers in business.

In the instant case the Defendants citizens of Kenya, have not honoured those instruments and the Courts will therefore not hesitate to grant the requisite reliefs sought by the Plaintiff. In the circumstances, I grant prayers (4) to (9) inclusive of the Chamber Summons dated 12th and filed in Court on 14th October 2004. There shall be orders accordingly.

Dated and delivered at Nairobi this 24th day of November 2004.

ANYARA EMUKULE

AG. JUDGE