



**IN THE REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL CASE NO.1618 OF 2002**

**MAKFAM INVESTMENTS LTD .....PLAINTIFF**

**V E R S U S**

**FRANCIS PETER KIRANGA .....DEFENDANT**

**R U L I N G**

Chamber summons dated 24th October 2002 is by the plaintiff limited liability company herein asking for injunction to restrain the defendant, his servants and or agents from interfering and or destroying the structures erected on LR No.14675 managed by Mary Wairimu Kiranga. The second prayer which is under ground 4 therein are two prayers which seek orders first that Mary Wairimu Kiranga be made to control and use Motor vehicle KAE 005V and KAM 080B and occupy LR No.209/10721/18 South C and defendant to occupy LR.14675 and further that defendant be made to have Tahcec eisssu.e here concerns the plaintiff company which was started by a couple, a man and wife for the benefit of their 5 children. The last one still an infant, who became the directors of the company. They then executed powers of attorney giving to their father the right to represent them in the company. But now they feel the father has exceeded his authority and moved to revoke the powers. Four of them have filed affidavits in support saying:-

***“That I and the other directors have reliably learnt th at our father the defendant has irregularly fraudulently and inappropriately appointed himself the sole director of the company and has been running its affairs for his sole benefit and to the exclusion of our mother Mary Wairimu Kiranga”.***

This is the main complaint that has triggered the applicTahteio nd.efendant opposes this application and by his replying affidavit of 8th November 2002 protests the bad faith his own children have displayed when he formed the company for their benefit during their youth and that they were always in the US and could not run the company. That the property mentioned were transferred to the plaintiff company as security measure against creditors and that the case is a creature of the mother`s intrigues and that the mother has filed a suit for sharing of matrimonial property. That the chicken business is financed by MS GAMMA VILLA LTD. a different company.

These are the facts and I have heard the submissions of both counsel who anchored their arguments on facts but not the law that is attendant to the issues raised.

Both mandatory and prohibitive injunctions asked for here are equitable remedies and must satisfy those standards which are applicable. They also are discretionary and like all discretionary remedies it cannot be exercised by merely considering what as between the parties would be fair to be done but be exercised in accordance with settled principles. First that the applicant should have clean hands. The court declines

to grant equitable remedy where there is evidence of any illegality, fraud, misrepresentation or mistake, also where there has been unreasonable delay and further court will not grant relief where to do so would cause great hardship amounting to injustice. As for mandatory injunction which is prayed here Megarry J said in the case of SHEPHERD HOMES LTD vs SANDHAM [1970] WLR 365 as follows:-

***“As it seems to me there are important differences between prohibitory and mandatory injunctions. By granting prohibitory injunction the court does no more than prevent for future the continuance or repetition of the conduct of which the plaintiff complains. The injunction does not attempt to deal with what has happened in the past that is left for the trial to be dealt with by damages or otherwise on the other hand a mandatory injunction tends at least in part to look to the past in that it is often a means of undoing what has already been done so far as that is possible. Furthermore whereas a prohibitory injunction merely requires abstention from acting a mandatory injunction requires the taking of positive steps and way ...the dismantling or destruction of something already erected or constructed.*”**

***This will in a consequent waste of time, money and materials if it is ultimately established that the defend ant was entitled to retain the erection .....an interlocutory application for mandatory injunction was one of the rarest cases that occurred for the court would not compel a man to do so serious a thing as to undo what he had done except at the hearing. Even if today the degree of seriousness of such an order is not quite so profound the seriousness of such an order remains as an important factor. Another aspect of the point is that if a mandatory injunction is granted on motion there will normally be no que stion of granting a further mandatory injunction at the trial. What is done is done and the plaintiff has on motion obtained once and for all the demolition or destruction that he seeks. Where the injunction is prohibitory however, there will often still be a question at the trial whether the injunction should be dissolved or continued.”***

Mandatory injunction is asked for but these principles not dismissed. There is no procedural rules upon which mandatory injunction is granted. The courts use S.3A of the Civil Procedure Act as inherent jurisdiction. It is a drastic remedy and in our jurisdiction the court of appeal declared that it be granted sparingly and with reluctance and only in very special circumstances.

Gicheru JA (as he then was) in EAST AFRICAN FINE SPINNERS LTD (IN RECEIVERSHIP) & 2 OTHERS Vs BEDI INVESTMENT S C.A. Civil application NO.NAI 72 / 1994 approved Megarry J’s statement above referred to.

The honourable judge of appeal added that the court has to consider whether in the circumstances as they exist after the breach if a mandatory order and if so what kind of a mandatory order will produce a fair result.

Megarry J had this to say:-

***“In this connection the court must ..take into consideration amongst other relevant circumstances th e benefit which the order will confer on the plaintiff and the detriment which it will cause the defendant.”***

These are the principles to be applied. The second prayer is for prohibitive injunction and the principles applicable in this branch of the law is now settled. According to Spry JA. In GIELA Vs CASMAN BROWN LTD 1978 EA 538 it was stated that for applicant to succeed the applicant must show a prima facie case with probability of success secondly he must show that he will suffer irreparable damage that cannot be properly compensated by an award of damages and if in doubt to decide the case on a balance of convenience.

Here the shareholders of a limited company want to withdraw authority they gave to their father to manage the company. It appears that the quarrel is really between the wife and the husband and regarding the property. There is admission that the land in question was transferred to the company to avoid creditors. That was fraudulent transfers transaction.

Then there is the allegation of fraud, irregularity and impropriety against the defendant by his son Bernard Kamau Kiranga in his affidavit (para 6) sworn on 3rd October 2002 which is made on mere hearsay without the source of that information being disclosed.

It is not proper in an affidavit to make such allegations which cannot be cross examined on. Besides since the sources of information are not stated the veracity of those allegations are weakened.

Bosire JA in C.A Civil Appeal No. 124 of 1996 EAST AFRICAN PACKAGING INDUSTRIES LTD Vs ZOEB ALIBHAI said:-

***“.....the source of information and the grounds of belief are primarily essential for purposes of veracity. Consequently a failure by a deponent to disclose with particularity the sources of information he has deponed to has the effect of weakening the probative value of the information and can render it worthless.....”***

I think there is family intrigue and animosity here and one needs to see that affidavits are free from exaggeration and bias. The children who swore the affidavit are themselves in the states. Who will run the company in their absence. Furthermore when they say that their younger brother has been taken out of the school but the father Francis Peter Kiranga says in his further affidavit sworn on 27th January 2003 that he had paid for admission (FRK5) for his son to joint ST. ELIZABETH ACADEMY – KAREN is the allegation there free of exaggeration but it is the wife who has declined to take the child hence the child is not in school. If that be so it means that the supporting affidavit is not candid as this was not disclosed neither was it challenged.

Again the allegation that the defendant has appointed himself sole director seems to have been adequately countered by the defendants reply showing that at a general meeting of the company on 12th July 000 a resolution appointing 3 directors to the company including the defendant was passed and also giving the defendant a majority share holding of 500 shares where the other had 1 share each.

Looking at this application first I must say that there are some misrepresentations in the affidavits. I do not believe the allegations set out therein in the supporting affidavit.

As I observed above this is an equitable remedy and a party cannot claim equity in its own misrepresentations and none – veracity. Thee is what is legally called dirty hands in the application.

More even if that was not to be so, I think the applicants have not shown that they have prima facie case with probability of success.

For these reasons I dismiss the application for both prohibitory and mandatory injunction with cost.

Read this 7th March 2003

**A. I. HAYANGA**

**J U D G E**

Read to Mr. Mungala f or applicant

“ “ Mr. Nduati for respondent