



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL SUIT NO. 440 OF 2002

BOTTINI GIAN CARLO PLAINTIFF

- VERSUS -

WALTER CIGNI 1ST DEFENDANT

SUGAR REFF LIMITED 2ND DEFENDANT

R U L I N G

Before the court is a Notice of Motion dated 11th December, 2002 brought under the Provisions of Order 39 rules 5 and 7 and Order 50 rules 1,2 and 3 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. The main orders sought are as follows:

A That an order be issued barring and prohibiting the 1st Defendant from conducting the affairs of the 2nd Defendant particularly the business known as Baby Marrow Restaurant to the exclusion of the plaintiff pending the hearing and determination hereof.

B That an order be issued authorizing an officer of the court or alternatively the O.C.S. Malindi Police Station or such other person as the court may deem necessary to enter into the offices of the said Defendant's business known as Baby Marrow Restaurant and once therein to detain and preserve any financial or other records they may find therein such as books of Accounts, receipt, Banking slips, statements etc. and produce them before the court on such date as may be specified therein.

C. That this Honourable court be pleased to issue such other further orders as may be necessary for the ends of justice.

The application was first before the Court on 11.12.02 when it was certified urgent and an order to dispense with service in the first instance and an interim order of an injunction were granted. A further order to the effect that the application be served on or before 13.12.02 was issued and an affidavit of service sworn on 13.12.02 was filed on 19.12.02.

The Defendants filed an appearance, grounds of application and Notice of Preliminary objection through their appointed lawyers Mouko and Company Advocates. An Affidavit in reply sworn by the first defendant on his behalf and that of 2nd defendant sworn on 19.12.02 was filed on the same date.

On the 20.12.02 when the matter came up for hearing there was no appearance on the part of the defence and having gone through the documents filed as well as the Affidavit of service I was satisfied that the defendants were properly served and were aware the matter was set for hearing as the Court order did show the date for the next hearing .

Mr. Gekonde, Counsel for the applicant submitted that the plaintiff and the 1st Defendants are both directors of the 2nd Defendant which operates a business entity at Malindi known as “Baby Marrow Restaurant” and that the 1st Defendant had without reason looked out the plaintiff from engaging in the affairs of the said business. In his Affidavit in support the plaintiff avers that he has been physically locked as locks were changed. He further avers that the 2nd Defendant has refused to have the accounts done and has been alleging the business was operating at a loss which the plaintiff disputes. From his replying Affidavit, the 1st defendant does concede he has been the man on the ground running the business affairs but he denies the business is operating at a profit and that he locked out the plaintiff.

From the documents on record, there is no doubt a business relationship between the two has gone sour and there is a lot of mistrust. It is also deponed by the first defendant that they invested an amount of Kshs.1,100,000/= which was to be recovered from the profits.

Before the grant of an order of an injunction a party so applying must satisfy the court that at least one among the 3 main ingredients set out in the Giella vs Cassman Brown case has been fulfilled. Counsel did not go into much details but there is no doubt the plaintiff stands to loose if the 1st Defendant fails to Co-operate. On the other hand the plaintiff did not offer any security and it is not known whether the business was still operating. In the interest of justice and I will grant the following:

1. An order prohibiting the 1st Defendant from Conducting the affairs of the 2nd Defendant particularly the business known as Baby Marrow Restaurant to the exclusion of the plaintiff pending the hearing and determination of this suit.
2. An order authorizing the In-Charge of the Malindi Sub-Registry to enter into the offices of the Defendants and the business known as Baby Marrow Restaurant in the company of the plaintiff and the 1st Defendant and therein to take into custody all books of accounts, receipts, Banking slips, statement etc. and keep them in his custody until any other orders are sought and issued to the plaintiff.

Dated and Delivered at Mombasa this 10th day of April, 2003.

P.M. TUTUI

COMMISSIONER OF ASSIZE

At the request of Hon. Commissioner P.M. Tutui, this ruling is read today 10th April, 2003 in Court in presence of Joseph Gathuku for Applicant. No appearance for 1st Defendant.

J. KHAMINWA

COMMISSIONER OF ASSIZE