



REPUBLIC OF KENYA



KENYA LAW
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Kedocadocs Tress And Poultry Farms LLP v Kiwara & another (Commercial Cause E001 of 2022) [2024] KEHC 4195 (KLR) (17 April 2024) (Judgment)

Neutral citation: [2024] KEHC 4195 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
COMMERCIAL CAUSE E001 OF 2022**

HM NYAGA, J

APRIL 17, 2024

BETWEEN

KEDOCADOCS TRESS AND POULTRY FARMS LLP PLAINTIFF

AND

BONIFACE KIWARA 1ST DEFENDANT

EUNICE WAIRIMU MWANGI 2ND DEFENDANT

JUDGMENT

1. By a Plaint dated 29th March, 2022 the Plaintiff moved this court seeking for judgement against the Defendants for: -
 - a. Orders removing the Defendants as Partners of the Plaintiff.
 - b. A permanent injunction restraining the Defendants by themselves, their agents, employees or anyone or anyone acting under their instructions from interfering with the business of the Plaintiff and from harassing and intimidating the partners and employees of the plaintiff.
 - c. Special damages amounting to \$2,000.00 USD.
 - d. General Damages.
 - e. Costs of this suit and interest thereon.
 - f. Any other relief that this Honourable court will deem fit and just to grant.
2. The plaintiff pleaded that the defendants are its partners and that within a year or so, the 1st Defendant has been dealing with alcoholism rendering him inefficient as the Chief Operating Officer and Managing Partner.



3. That the partners of the plaintiff have made attempts to support, advise, and encourage the 1st Defendant to seek medical professional assistance for his apparent mental and physical struggle with extreme alcohol addiction.
4. It averred that 1st Defendant has repeatedly attended work while intoxicated despite frequent reminders asking him to follow its policies and procedures.
5. That on or about 24th January, 2022, the 1st Defendant was given an opportunity to defend his gross misconduct in the workplace and to show cause why his services should not be terminated from the partnership in the public interest but he did not attend the said meeting despite numerous phone calls and reminders.
6. That the 1st defendant has been given numerous chances to redeem himself over the last year or so but the same has been unsuccessful as he is a habitual drunkard.
7. It was pleaded that on or about 2nd February, 2022, the Defendants, jointly, entered the work premises and physically assaulted Elijah Gaiti Kimani and Boniface Nderitu who are also employees and/or partners of the plaintiff and that the 1st Defendant had on several occasions threatened to kill the said employees.
8. The plaintiff further averred that the defendants destroyed and stole its equipment as well as personal property of their employees and/or partners worth \$2,000.00 USD.
9. That despite the matter being reported to the police, the defendants have continued to threaten, assault, harass and intimidate other partners, employees and clients and disrupt the Plaintiff's business.
10. It was pleaded that on 8th February, 2022, the 1st Defendant sent an email tendering his resignation and that of the 2nd Defendant from the Partnership but despite their voluntary resignation, the defendants have blatantly refused to execute supporting documents to effect the same.
11. That on or before 10th March, 2022 majority of the partners agreed that the Defendants should be removed from the Partnership and they consequently consented and passed a resolution for the said removal.
12. The Plaintiff averred that it issued the defendants with termination letters on 10th March, 2022 for crimes against it for misusing, destroying and stealing its property, harassing, assaulting and intimidating its servants and agents, improper or indecent conduct within the work place, excessive lateness and/or absence, reporting to work intoxicated, in violation its policies and rules.
13. The record reveals that the defence did not respond to the summons and the plaintiff applied for interlocutory judgment on 30th May, 2023, hence the matter proceeded by way of formal proof.
14. Donna Lynn Patton who is the Principal shareholder and Chief Executive Officer of the plaintiff was the sole witness. She reiterated the averments in the plaint.
15. She also relied on the List of Documents dated 29th March, 2023 and produced the documents therein as Exhibits Nos. 1 to 14.

Analysis & Determination

16. The issues that arise for determination are: -
 - a. Whether this court should order the Removal of the Defendants as partners of the Plaintiff
 - b. Whether the injunctive order sought should issue.



- c. Whether the Plaintiff is entitled to any Damages.
17. Section 44 of the Partnership Act Cap 29 provides for the Power of Court to make order removing partner or breaking up partnership as follows: -
- “1. The Court may, on the application of any partner, make an order—
- a. removing the partner from the partnership;
 - b. removing another partner from the partnership; or
 - c. breaking up the partnership
2. In making an order under subsection (1), the Court shall have regard to—
- a. the partner’s capability of performing a partner’s duties in the partnership;
 - b. the effect of the partner’s conduct on the partnership business;
 - c. any breach, by a partner, of a term of the partnership agreement;
 - d. any fraud, misrepresentation or non-disclosure by any partner when the partners enter into a partnership or modify a partnership agreement;
 - e. any event that occurs making it unlawful for the partner to remain a partner;
 - f. any losses incurred by the partnership and the prospects of carrying on the business partnership profitably;
 - g. any other ground the Court considers appropriate.”
18. In the instant case, the plaintiff seeks removal of the 1st Defendant for reasons that he is unable to render his services as a chief operating officer and managing partner due to extreme alcohol addiction, that he physically assaulted its employees i.e. Elijah Gaiti Kimani and Boniface Nderitu and that on several occasions he has threatened to kill them, that he destroyed and stole its equipment as well as personal property and despite the matter being reported to the police and that he has continued to threaten, assault and harass and intimidate other partners, employees and clients and disrupt its business.
19. The 2nd defendant has been similarly accused of physically assaulting the aforesaid persons and for destroying and stealing the Plaintiff’s equipment’s as well as personal property.
20. It is trite law that he who alleges must prove. Section 107 of the *Evidence Act* puts to rest the issue of where the burden of proof lies and provides that:
- “(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”
21. The burden of proof in civil cases on the balance of probability. The balance of probability standard was defined in the case of Kanyungu Njogu vs Daniel Kimani Maingi [2000] eKLR that when the



court is faced with two probabilities, it can only decide the case on a balance of probability, if there is evidence to show that one probability was more probable than the other.

22. In re H C minors {1996} AC 563 at 586 – Lord Nicholls explained himself as follows:

“The balance of probability standard means that a Court is satisfied an event occurred, if the Court considers, that, on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities, the Court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegations, the less likely it is that the event occurred and, hence, the stronger should be the evidence before the Court concludes that the allegation is established on the balance of probability. Built into the preponderance of probability standard is a generous degree of flexibility in respect of the seriousness of the allegation”

23. The Plaintiff produced an Occurrence Book (O/B) entries from Molo Police Station but there are no contents therein to verify the reports were in regards to the actions committed by the defendants herein. The plaintiff ought to have produced the OB extract with better particulars to bolster its case or photographs to prove the damaged properties.
24. Further, the said Elijah Gaiti Kimani and Boniface Nderitu who were allegedly assaulted did not either swear any affidavit or testified in this matter to buttress the plaintiff's assertions. I therefore find that there is no cogent evidence to prove that the defendants either destroyed and stole the Plaintiff's property or assaulted any of its employees as alleged.
25. Regarding the 1st Defendant's alcoholism, the plaintiff produced a copy of a picture showing a man lying on a seat and captioned it inter alia as the 1st defendant lying intoxicated after he stormed the office and harshly demanded to be handed a thousand shillings in cash. The Plaintiff also pleaded that the 1st Defendant had been given numerous chances to redeem himself over the past year or so but the same has been unsuccessful.
26. The 1st defendant did not defend this matter despite having knowledge of the same. The Plaintiff's assertion therefore regarding his abuse of alcohol is unchallenged and I find the plaintiff has proved on a balance of probability that the 1st Defendant is an extreme alcoholic and thus unable to render his services to it as the chief operating officer and managing partner.
27. I have perused the copies of the Resolution and votes by the plaintiff's partners. I do confirm that the 19 partners voted to have the 1st Defendant removed as a partner and in his place Boniface Nderitu be appointed as a manager and chief operating officer.
28. I thus find that there are satisfactory grounds to remove the 1st Defendant by dint of Section 44 (1)(a) & 2(a)& (b) of the *Partnerships Act*.
29. Consequently, I hereby issue an order to remove the 1st Defendant as the partner of the Plaintiff.
30. The Plaintiff has not laid solid grounds that would warrant this court to order for the removal of the 2nd Defendant. Unlike the 1st defendant, nothing has been laid before the court to show that she conducted herself in a manner that was prejudicial to the plaintiff.
31. However the court notes that the 2nd defendant did resign from the plaintiff vide an email. There is a resolution dated 18th May 2022, signed by the other partners, sanctioning her removal.
32. Therefore as against the 2nd defendant, I find that the plaintiff has also proven its case on a balance of probability.



33. On whether to grant permanent injunction, this court is guided by the principles in *Giella vs Cassman Brown* [1973] E.A 358 which include: whether the applicant has shown prima facie case with a probability of success; whether the applicant shall suffer irreparable injury which cannot be compensated by damages; and if the court is in doubt then it can decide the application on a balance of convenience.
34. In *Mrao Ltd vs First American Bank of Kenya Ltd & 2 ors* Civil Appeal No. 39 of 2002, the court described prima facie case as:
- “in civil case, it is a case in which on the material presented to the court a tribunal properly directing itself will conclude that there exists a right which has been infringed by the opposite party as to call for an explanation or rebuttal from the latter”
35. In the case of *Kenya Power & Lighting Co. Limited vs Sheriff Molana Habib* [2018] eKLR, the court held thus;
- “A permanent injunction fully determines the rights of the parties before the court and is thus a decree of the court. The injunction is granted upon the merits of the case after evidence in support of and against the claim has been tendered. A permanent injunction perpetually restrains the commission of an act by the defendant in order for the rights of the plaintiff to be protected.”
36. The Court in *Bandari Investments & Co. Ltd vs Martin Chiponda & 139 others* [2022] eKLR stated its position in regards to permanent injunction as follows: -
- “Permanent Injunction fully determines the right of the Parties before the Court and is normally meant to perpetually restrain the commission of an act by the Plaintiff in order for the rights of the Plaintiff to be protected. This Court has the powers to grant the Permanent Injunction under Sections 1A, 3 & 3 A of the Civil Procedure Code, 2010 if it feels the right of a Party has been fringed, violated and/or threatened as the Court cannot just seat, wait and watch under these given circumstances.”
37. The plaintiff has established prima facie case by proving that the 1st defendant is unable to efficiently discharge his duties due to alcoholism. The name and reputation of the plaintiff ought to be protected and the conduct exhibited by the 1st defendant is highly probable to ruin it.
38. I therefore find that the plaintiff will suffer irreparable damage if the 1st Defendant is not barred from going to its business precincts. In my view the balance of convenience tilts in favour of the Plaintiff as its business will be negatively affected by the 1st Defendant’s aforementioned conduct.
39. With respect to Special damages, it is trite law that special damages must not only be specifically pleaded but also strictly proved, what amounts to strict proof must depend on the circumstances that is to say, the character of the acts producing damage, and the circumstances under which those acts were done. See *Nizar Virani T/A Kisumu Beach Resort vs Phoenix of East Africa Assurance Company Limited* Civil Appeal No. 88 of 2002 [2004] 2 KLR 269, *Gulhamid Mohamedali Jivanji vs Sanyo Electrical Company Limited* Civil Appeal No. 225 of 2001 [2003] KLR 425; [2003] 1 EA 98, *Coast Bus Service Ltd vs Sisco E. Murunga Ndanyi & 2 Others* Civil Appeal No. 192 of 1992.



40. Similarly, in Hahn vs Singh, Civil Appeal No. 42 of 1983 [185] KLR 716, the Court of Appeal held as follows;

“Special damages must not only be specifically claimed (pleaded) but also strictly proved... for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves.”

41. In the instant case the plaintiff has pleaded for special damages of \$ 2,000.00 USD. Receipts of Kshs. 12,000/= and Kshs. 32,000/= were produced in evidence. Had the plaintiff successfully proved that the incurred the above expenses as a result of the defendants’ acts I would have awarded it Kshs. 44,000/=

42. I find no basis for granting general damages to the Plaintiff. No sufficient evidence was adduced to prove the same. Damages are not awarded as a matter of course. There must be proof of loss and damage, which is not the case here.

43. In the end, I grant the following orders: -

- a. The Defendants be and are hereby removed as partners of the plaintiff with effect from 18th February 2022.
- b. The defendants to be refunded their respective share of contribution subject to the return of any equipment belonging to the plaintiff that is in their possession.
- c. A Permanent injunction be and is hereby issued restraining the 1st Defendant by himself, his agents, employees or anyone or anyone acting under his instructions from interfering with the business of the Plaintiff.
- d. Prayers for General and Special damages be and are hereby declined.
- e. Costs of this suit to be borne by the Defendants.

44. Orders Accordingly.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 17TH DAY OF APRIL, 2024.

H. M. NYAGA,

JUDGE.

In the presence of;

Court Assistant Philip

Ms Mwangi for Plaintiff

No appearance for defendants

