



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL CASE NO. E008 OF 2021

CECILIA WANGARI.....PLAINTIFF/APPLICANT

VERSUS

BERNADETE NJOKI MAMBO.....DEFENDANT /RESPONDENT.

RULING.

1. The applicant filed a Notice of Motion application dated 23RD November 2020 pursuant to the provisions of **Order 40 of the Civil Procedure Rules, Section 1A,1B & 3A of the Civil Procedure Act** and requested for the following orders;

a) THAT an order for injunction be and is hereby issued restraining the Respondent whether by herself, her servants, agents, representatives, or anyone acting on her behalf from interfering with the Plaintiff's work, rights and duties as a director and shareholder of Nuru palace Hotel limited or otherwise in any way whatsoever or howsoever denying the Plaintiff access, entry or possession of the entire premises of Nuru Palace Hotel Limited including the plaintiff's office, pending the hearing and determination of this application.

b) THAT an order for injunction be and is hereby issued restraining the Respondent whether by herself, her servants, agents, representatives, or anyone acting on her behalf from interfering with the Plaintiff's work, rights and duties as a director and shareholder of Nuru palace Hotel limited or otherwise in any way whatsoever or howsoever denying the Plaintiff access, entry or possession of the entire premises of Nuru Palace Hotel Limited including the plaintiff's office, pending the hearing and determination of this suit.

c) THAT a mandatory order be and is hereby issued compelling the Respondent to deposit all proceeds of Nuru Palace Hotel limited into joint accounts held by both the plaintiff and the defendant pending the hearing and determination of this application.

d) THAT a mandatory order be and is hereby issued compelling the Respondent to deposit all proceeds of Nuru Palace Hotel limited into joint accounts held by both the plaintiff and the defendant pending the hearing and determination of this suit.

e) THAT an order for injunction be an is hereby issued restraining the Respondent whether by herself, her servants, agents, representatives, or anyone acting on her behalf whatsoever from removing or purporting to remove the Applicant' as a shareholder and director of Nuru Palace Hotel Limited pending the hearing and determination of this application.

f) THAT an order for injunction be and is hereby issued restraining the Respondent whether by herself, her servants, agents, representatives, or anyone acting on her behalf whatsoever from removing or purporting to remove the Applicant as a shareholder and director of Nuru Palace Hotel Limited pending the hearing and determination of this suit.

2. The application is premised on the grounds on the face of the record and a supporting affidavit of Cecilia Wangari who averred as follows;

3. **THAT** she is the director and shareholder of Nuru Palace Hotel Ltd which was incorporated in April 2008 having subscribed to the Company Articles and Memorandum, and holds 5% shares therein.

4. **THAT** prior to the incorporation of the company, the respondent, applicant and one John Kuria, bought property title Nakuru Municipality/ Block 4/141 in which the Company now situates. The applicant had to resign from her employment at Oriental Bank to oversee the construction of the hotel.

5. **THAT** Nuru Palace Hotel opened for operations by August 2008 and at that time the applicant and her family resided at an old house

situated within the property Nakuru Municipality/Block 4/141 and she worked as the managing director of the Company since 2008 overseeing most of its operations including management of supplies, filing returns and generally managing the company accounts and she received an allowance of Kshs. 40,000/per month which was later on increased to Kshs. 100,000/per month.

6. She went on to state that they are both signatories to KCB Nakuru Branch and Kenya Women Microfinance bank accounts opened under the name Nuru Palace Hotel limited where they had borrowed a loan from and cleared in 2019.

7. **THAT** sometime in November 2019, the Respondent went to the applicant's office and asked her to hand over all her documents and leave the Nuru Palace Hotel premises. Upon enquiry of why the turn of events, the respondent remained silent. Even after explaining to the respondent that she had pending work that she needed to finalize, the respondent insisted that the applicant had to leave.

8. The applicant returned the next day to pick her personal belongings only to find her office key had been changed. She later on received a letter from the respondent enclosing 3 cheques totaling Kshs. 1.5 million which she termed as "send-off appreciation".

9. The Respondent she argued cannot purport to have removed the applicant as a director and shareholder of the Company without following due process of the law as contained in the **Companies Act No. 17 laws of Kenya** or without considering the provisions of the **Company Articles of Association**.

10. **THAT** the Respondent's actions are unlawful, illegal, and unfair and if this Honourable court does not intervene to remedy the wrongs occasioned against the applicant, she is likely to lose all her shareholding and her rights in management of the company that she devoted all her efforts to. If the Respondent continues to run the operations of the hotel to the exclusion of the applicant, she might be exposed to both criminal and civil liability against the Company by dint of her shareholding and directorship.

11. The respondent filed a replying affidavit and averred that the application is devoid of merit and the same is an abuse of court process as such it ought to be dismissed with costs to the respondent.

12. The respondent averred the Supporting Affidavit is replete with falsehoods meant to hoodwink this court into issuing undeserving orders as the applicant has not disclosed material facts that are relevant for the proper determination of this case and indeed those facts would prove that the applicant is trying to steal a match from the respondent. The applicant is thus not deserving of any interim or final orders as sought.

13. The respondent averred that in 2008 when the company was incorporated, she was living in the United States of America and would occasionally visit Kenya to check on her projects the subject hotel being one of them. Whilst in abroad the respondent did come up with a plan to venture into the hospitality industry and initiated the plans to start a hotel which christened NURU PALACE HOTEL.

14. The respondent averred that since she was mostly out of the country she needed someone who could run errands for her and follow up on the construction of the hotel. She thus had conversations with the applicant, who happens to be her blood sister and they agreed that she would assist with the running of errands toward the starting up of the hotel. It was their agreement and understanding that they would pay her a monthly salary of kshs 40,000/= then which she readily accepted having confirmed that she had fallen out with her then employer M/s Oriental Commercial Bank Ltd.

15. The respondent went on to state that she had already bought the land on which the hotel was to be built, she used a registered business "NURU DEVELOPERS" a name which they had registered together with the applicant and another person by the name JOHN KURIA KAMAU. This registered name was the vehicle in which the three could individually use to buy. Since they already had a land buying company, she opted to use the same as the respondent's partner in the company, Mr. John Kuria would have the sufficient capacity, knowledge and manpower to undertake the transfer and registration process and basically the entire conveyance process.

16. The respondent averred that it was indeed the understanding between the three that the land being bought NAKURU MUNICIPALITY BLOCK 4/141 would be fully owned by the respondent since she was to provide the entire purchase price and incur all the conveyance costs and her partners then under NURU DEVEPOLERS would thus impliedly have their names in the title documents but in trust for respondent.

17. The respondent averred that indeed there are other transactions done under the name NURU DEVELOPERS which are fully owned by Mr. John Kuria despite the fact that the three including the applicant herein jointly appear as the shareholders of NURU DEVELOPERS. The respondent paid a total of Kshs 4,000,000/= sometimes in the years 2002 and 2003 which was the purchase price of the suit land NAKURU MUNICIPALITY BLOCK 4/141 which money she paid without the applicant chipping in.

18. The respondent averred that she later in the year 2007, received communication from the Ministry of Housing that the said property had been part of government properties that were disposed off as non-strategic government houses and for a proper title to be issued she was required to pay the amount of Kshs 4,500,000/= to government to validate the transaction. She single-handedly paid the said amount sometime in the year 2013 since she was the rightful owner of the suit property. The respondent also single-handedly commenced construction of the hotel premises without any monetary contribution from the applicant up to and including payment of the land rates of Kshs. 210,000/= which she has paid to date.

19. The respondent needed the presence of someone who could execute some procedural documents, meet with contractors and generally follow up with the construction and the start-up process and that is why she engaged her sister who had initially approached her and sought help as she had fallen out with her employer and was seeking for an alternative employment. She stated that she even housed the applicant and assisted her to meet some of her personal expenses including her children educational needs and medical needs. The respondent orally agreed with the applicant that she would hold 5% shares of the Company in trust for the respondent but this was not to entitle her to any profit/loss sharing ratios or beneficial ownership status.

20. They even agreed on a salary which was Kshs 40,000/= and later increased to Kshs 100,000/=. The applicant was never involved in

taking up dividends or profits or even losses, a fact that she was all along aware of and never complained against until the year 2019 when she communicated her willingness to exit her employment from Nuru Palace hotel and she even willingly handed over the office keys to the respondent. Upon her exit, the respondent gratuitously gave her a sendoff appreciation of Kshs 1.5 million considering that they had worked well over the years and she had also requested to be boosted as she tries her hand in business, hence, the said payment was made out of good faith from a sister to another.

21. The applicant at the time of her exit had even agreed to have her name removed as a signatory to the hotel's bank accounts and we signed the mandate to show the same as requested by the bank. It was upon her request to exit that the respondent notified the hotel's bank that the applicant is no longer an employee hence she could not operate the hotel's bank account and indeed this was just a procedural step since she initially was allowed to operate the account by virtue of her employment as a manager.

22. After the applicant resigned from employment, she did start a business by the name KAVID LUXURY in which she was supplying soap to the hotel, which business they engaged very well until the respondent temporarily closed down the hotel when the COVID-19 pandemic struck. The respondent was shocked to learn that the applicant was demanding payments worth 5% of the value of the hotel and a third of the land where the hotel is situated yet all along she knew she was holding those shares in trust for the respondent.

23. The respondent averred that the applicant is trying to use this Honourable court to acquire a legal interest over a company she knows that is belongs to the respondent and it would thus be unfair and unjust to cripple the operations of the hotel by issuing the sought orders before this issue of ownership vis a vis the existing trust can be determined fully. The applicant has indeed not provided sufficient reasons to warrant the issuance of the orders sought.

24. The respondent averred that the application and the entire suit is fatally defective and against the provisions of the **Company Act No.17 of 2015** and as such the same should be struck out ab initio.

25. John Kuria Kamau also filed a replying affidavit and stated that the applicant failed to disclose material facts that are relevant for proper determination of this suit and more so on the issue of ownership of Nakuru Municipality Block 4/141. The deponent averred that they have been using the registered name Nuru developers to purchase their own properties and that it is the respondent who had paid the entire purchase price for the suit land and the same could invest in her and any form of ownership that the applicant or the deponent could claim would be in trust. The deponent also confirmed that it is the respondent who paid for the construction of the hotel.

26. The application was canvassed by way of written submissions. Both parties filed their own submissions and therein under is the summary of the same

Applicant's Submissions

27. The applicant submitted that the defendant has deliberately and consciously set out to harass, vilify, oppress and exclude her from the running, management and participation to the day-to-day activities of the company. The defendant purports to have removed the plaintiff as a director and shareholder of Nuru Palace Hotel Limited without following due process of the Law. There has been no Board meeting to deliberate on the removal of the plaintiff as a director, there has been no offers to purchase her shares and there has been no express consent to changing bank account signatories.

28. The applicant submitted that the **Memorandum and Articles of Association** of the Company as a supreme document regulates the day-to-day running and management of the Company. It is regarded as a statutory contract which binds the members to the Company and the company to its members. Consequently, a member of the company may sue another member to restrain an imminent breach of the **Articles of Association. Article 9** of the Nuru Palace Hotel limited Articles of Association states that the directors of the Company shall not be less than two and not more than seven. It is thus in total contravention of the provisions that the defendant seeks to remove the Plaintiff as a shareholder and assuming full control of the company.

29. The defendant claims that the Plaintiff was holding shares in trust whereas the plaintiff contributed capital for the company and subscribed to the memorandum and articles. The applicant submitted that the respondent's attempts to remove her as a director are illegal as they contravene the provisions on removal of directors as contained in **Sections 139 and 141 of the Companies Act of 2015**. Further, the applicant does not wish to relinquish her shares but to transfer the same for valuable consideration.

30. The applicant submitted that she has met the legal threshold to warrant grant of injunctive relief against the defendant restraining the defendant from denying her entry into the company and further purporting to remove her as a shareholder and director of Nuru palace hotel limited. She relied on the case of **David Ngugi Ngaari v Kenya Commercial Bank Ltd [2015]** which summarized the principles governing grant of temporary injunctions.

31. The applicant submitted that the defendant is in the process of changing bank account signatories to bank accounts opened under the name of the company without the consent of the applicant. The letter to Kenya Women Microfinance bank dated 14 September 2020, allegedly signed by the Plaintiff is a forgery as she did not consent at any time to changing of bank signatories.

32. The applicant is apprehensive that the Defendant has commenced an application to have her name removed as a director and shareholder at the companies' registry and if the Defendant's actions are not restrained the plaintiff will suffer irreparable injury. She relied on the case of **Pius Kipchirchir Kogo v Frank Kimeli Tenai (2018) eKLR** which defined irreparable damage and the case of **Nation Media Group & 2 others vs John Harun Mwau [2014] eKLR** where the Court said:

“It is trite law that for an interlocutory mandatory injunction to issue, an applicant must demonstrate existence of special circumstances.”

33. The applicant submitted that she has met the threshold and that she owns legal rights as a director which rights have been arbitrarily infringed by the defendant. The applicant submitted that she used all her savings to pay the purchase price which totaled to Kshs. 4,000,000 without the contribution of either of the other two proprietors. The respondent was residing in the USA at the time and the applicant resigned from her employment purposely to oversee the construction process of the Hotel. At the time Nuru developers was being created, the plaintiff new and believed that the parties therein had formed a partnership with intention of doing business together for purposes of making profit. Hence, the property in question is partnership property as defined under **Section 24 (1) of the Partnership Act**. Further, **Section 28 of the partnership Act** provides that partners own equal shares in capital and profits of the business.

34. The applicant relied on the case of MWK & 2 OTHERS Versus R K K [2018] EKLR where the court stated that, ***“It is to be presumed that having not expressed or implied their shares then the Partners take their contributions to whatever nature to be equal. If it were otherwise, then they would have said so expressly or by implication. Whilst it may sometimes lead to some seemingly absurd or unjust outcome, it removes the need of putting value to the respective contributions of each partner when they themselves did not find it necessary to do so.”*** She urged the court to find that she owns equal shares to property title Nakuru Municipality block 4/141 hence she is entitled to a third of the property.

35. The applicant submitted that the respondent acted contrary to the **Section 139 and 141 of the Companies Act** which gives express provisions on the removal of a director. The applicant was never served with a notice which was to give her an opportunity to make any representations on removal. There were no board meetings to deliberate on her removal, she wasn't given an opportunity to air her grievances towards her removal. The defendant is thus acting arbitrarily and in a manner prejudicial to the rights of the plaintiff as a director, which rights are protected under the law. The respondent's actions contravene the Provisions of the Companies Act hence illegal.

36. The applicant submitted that the respondent's claim on trust is unfounded since at the time the Company was being registered, they both agreed to do business together for purposes of making profit. The applicant contributed to the nominal capital of the Company and was therefore entitled to profits and dividends of the Company. She placed reliance on the case of **Mary Kathambi v Julius K Ithai & Anor [2020] eKLR** where the court in granting a temporary injunction against a majority shareholder stated ***“the 1st Respondent's actions of sidelining the applicant despite being a director and shareholder of a company have not been denied. They can certainly be termed as oppressive and unfair...”***

37. The applicant further submitted that it is trite law that the burden of proving the existence of a trust lies on a party relying on its existence to prove it through evidence. She placed reliance in **Gichuki v Gichuki[1982] eKLR 285** where the court stated;

“The law never implies, the court never presumes, a trust, but in case of absolute necessity. The courts will not imply a trust save in order to give effect to the intentions of the parties. The intention of the parties to create a trust must be clearly determined before a trust will be implied.”

38. The applicant submitted that for a Court to imply a trust relationship, the intentions of the parties must be clear, that is, the circumstances of the case must clearly show that one party was holding property in trust for another. The applicant paid the purchase price of the property, which money was all her savings working at Oriental Bank. Hence if at all there exists a resulting trust, it ought to be in favour of the applicant who paid for the property in the belief that the parties therein intended to work together for purpose of making profit.

39. The applicant submitted that the respondent is misrepresenting facts when she says she paid the entire purchase price on her own and that she paid further validation fees from her own pocket yet at that time, the business was already making profit, hence all moneys paid came from the company. Both parties herein contributed equally towards the construction of the hotel. The plaintiff was even surprised when her shareholding was indicated to be 5% which the Defendant promised to rectify but she did not.

40. The applicant relied on the Supreme Court Case of **Isack M'inanga Kiebia v Isaaya Theuri M'lintari & Another [2018] eKLR** where the court held ***“When a party alleges a trust clear evidence of the same must be tabled. It will require special circumstances for a court to hold that there is a trust on the mere oral allegation that one exists, without there being additional documentary or other surrounding evidence, for example, in the manner in which the parties live, or other explanation or additional facts to demonstrate that the alleged trust actually exists. If this is not the case, then a person can claim that another holds land in trust for him or her and by that sole allegation, without additional supporting evidence, a trust would be held to exist, which to me is a fairly dangerous approach, unless indeed it is clear that special circumstances exist which bring one to no other conclusion other than a trust does actually exist. I have not seen any special circumstances in this case... From my above discourse, I do not see any merit in the plaintiff's case.”***

41. The applicant submitted that it would therefore be improper for the court to presume the existence of a common intention between the parties to create a trust and urged the court to find in favour of the applicant and issue injunctive orders against the respondent so as to protect the applicant against the illegalities committed by the defendant.

Respondent's submissions

42. The respondent submitted that the law on granting of interlocutory injunction is set out under **Order 40(1) (a) and (b) of the Civil Procedure Rules** and in the celebrated case of **Giella v Cassman Brown & Co. Advocates**. On the face of the application, there is no averment or evidence that the suit property of the hotel business is in danger of being wasted, damaged or alienated in any way. The respondent submitted that this prayer cannot be granted.

43. First of all, the applicant has confirmed in her application that she stopped working at the hotel in November 2019. She has never again worked in any capacity in the hotel ever since and as such the injunctive orders should not be given in vain. The respondent, on her part, has stated in paragraph 26 of the replying affidavit that it is the applicant who willingly exited her employment and the applicant has even annexed a correspondence from the applicant in which she was thanking the respondent for the 10 years they had worked together.

44. The respondent also submitted that the hotel is a private business and the proprietor reserves the rights of admission. In any event, the applicant has not demonstrated what exactly her fear is. The respondent deponed that even after the applicant willingly exited from the hotel, she started her own soap making business and the applicant even supplied the hotel with her soap. The applicant was a service provider to the hotel and at no time was she denied access to the hotel in her capacity as a supplier or as a guest. The applicant though cannot be allowed to come and disrupt the operations of the business simply because she has a pending case in court against the respondent's right to run the hotel.

45. The respondent submitted that the orders of mandatory injunction cannot be granted since the applicant has not satisfied the threshold of granting mandatory injunctive orders. The respondent submitted further that a mandatory injunction could be granted on an interlocutory application as well as at the hearing only in the presence of special circumstances.

46. The applicant herein has not demonstrated what harm she stands to suffer if the orders are not granted. In any case the applicant had willingly informed Kenya Women Microfinance Bank that the respondent should be the sole signatory as evidenced from the correspondence attached to the replying affidavit. The applicant has not operated the hotel's bank accounts since 2019, what possible irreparable loss could she claim to suffer then. The respondent submitted that the irreparable loss should be one that cannot be compensated by way of damages, the applicant is claiming 5% ownership, this is a quantifiable share that can be valued. In the unlikely event the application succeeds, her entitlements will be ascertainable.

47. The respondent relied on the case of **Paul Gitonga Wanjala v Gathuthis Tea Factory Company Ltd & 2 others (2016) eKLR** when submitting on the issue of balance of convenience and stated that since the applicant exited her employment in 2019, the respondent has continued running the hotel. It would thus be extremely prejudicial to the respondent if injunctive orders as sought are granted as the same will have the effect of grounding the smooth running of the hotel operations. If all the proceeds of the hotel are subjected to an account which will require the authorization of the applicant before any monies are withdrawn, then it may become impossible even to meet the day to day operational needs of the hotel.

48. The applicant on her part has really nothing to lose if the orders are not granted since she has not been receiving any incomes from the hotel since she resigned as a manager. The applicant has not stated that she had been receiving any profits which she can no longer receive. Thus, even the balance of convenience tilts towards declining to give the injunctive orders sought. The respondent noted that issues number 2, 3, 4 & 5 in the applicant's submissions are substantive issues to be determined at the hearing of the main suit. The respondent urged the court to refrain from making determination on the substantive issues that will still be brought to fore during the main hearing.

Issues for determination

Whether the applicant has met the legal threshold for the grant of an interlocutory injunction.

49. The legal threshold for the grant of interlocutory injunction is well set out in **GIELLA –V- CASSMAN BROWN & CO. LIMITED (1973) EA 3585** that: the applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide the application on the balance of convenience. It is therefore essential to examine whether the Plaintiff has met the above thresholds so as to order an interlocutory injunction against the Defendant.

50. By their very nature, orders of injunction are geared towards stopping a respondent from taking certain action. In the present case, the plaintiff seeks orders to restrain the defendants from removing her as a Director of the Company and further that the defendant/respondent be restrained from interfering with the Plaintiff's/applicant's work, rights and duties as a director and shareholder of Nuru palace Hotel limited. In the same breath, the plaintiff claims that she was irregularly removed as Director of the company in November 2019. Since then she has never been involved with the duties of the company. Clearly, the action the plaintiff seeks to stop, through this application has already been overtaken by events.

51. The court cannot in the circumstances be called upon to stop an act that has already taken place. I am guided by the decision in **Stanley Kirui v Westland Pride Limited [2013] eKLR** wherein it was held: -

“The court cannot injunct what has already happened. I will be guided by the findings in case of Mavoloni Company Ltd vs Standard Chartered Estate Management Ltd, Civil Appeal No. 266 of 1997[1997] LLR 5086, where the court held that “an injunction cannot be granted once the event intended to be injuncted has been overtaken by events.” Similar findings were held in the case of Esso Kenya Ltd Vs Mark Makwata Kiya, Civil Appeal No. 69 of 1991 where it was stated “an injunction cannot issue to restrain an event that has taken place.”

52. I also note that the defendant provided a detailed explanation of the circumstances that led to the plaintiff's association with the company and how she decided to step down from the company and started her own business. It is therefore my finding that the order of injunction being sought by the applicant if allowed, before the full hearing of the case, could amount to unnecessary interference with the internal affairs of the company.

53. Needless to say, courts have taken the position that they will not interfere with the internal affairs of a company. This is the position that was advanced in the celebrated case of **Foss v Harbottle (1843) 2 Hare 261** wherein it was held that;

“..... an elementary principle is that a court does not interfere with the internal management of companies acting within their powers:

54. The court further stated:

"Courts will interfere only where the act complained of is ultra vires or is of a fraudulent character or not rectifiable by ordinary resolution. It is really very important to companies and to the economy of the country in general, that the court should not, unless a very strong case is made out on the facts pleaded and proved or admitted, take upon itself to interfere with the domestic forum which has been established for the management of the affairs of a company"

55. In the instant case, the matters complained of do not border on fraud or ultra vires but are such that can be resolved by the company itself. In any case the court does not find that the applicant has established any *prima facie* case against the respondent.

56. In **Mrao Ltd v First American Bank of Kenya Ltd & 2 Others [2003] KLR 125** the court defined prima facie as hereunder;

"So what is a prima facie case? I would say that in civil cases 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 apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter."

57. For this reason, the court is of the considered opinion that the issues raised by the applicant does not entitle her to the orders sought. The grounds are not sufficient.

58. The court as well is alive to the preliminary objection raised by the respondent but there was no apparent reason to deal with the same for now for the reasons given above. The same could be revisited later.

59. The application is otherwise dismissed with costs to the respondent.

Dated signed and delivered via video link at Nakuru this 1st day of July 2021.

H. K. CHEMITEI.

JUDGE