



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

CIVIL SUIT NO.40 OF 2019

AIR PROMOTION GROUP EAST AFRICA LIMITED.....PLAINTIFF/APPLICANT

VERSUS

DAVID MURIUKI NJAU.....DEFENDANT/RESPONDENT

RULING

1. Before this Court is the Notice of Motion application dated 30th June 2019, by which AIR PROMOTION GROUP EAST AFRICA LIMITED (the Plaintiff/Applicant) seeks the following Orders:-

“(a) SPENT

(b) SPENT

(c) THAT pending the hearing and determination of this of this suit the Defendant his agent, servants, employees and/or nominees be restrained by an order or injunction from entering the Plaintiff’s offices, interfering, intimidating, coercing, holding out as a representative/employee/ agent/officer/director agent and or partner of the Plaintiff or from writing, communicating, or in any other way publishing any information about the Plaintiff’s or in any other way dealing with the Plaintiff’s business interest, purchase agreement with other companies or any other undertaking.

(d) THAT costs of this application be provided for.”

2. The application was premised upon Order 40 Rule 2 & 4, Order 51 Rule 1, Rule 1A & 1B, and Section 3A of the Civil Procedure Rules and Act and all enabling provisions of the law, and was supported by the Affidavit of even date and the Supplementary Affidavit dated 4th March 2019 both sworn by PHILEMON DAVIS MWAKITAWA one of the directors of the Plaintiff Company.

3. The Defendant/Respondent DAVID MURIUKI NJAU opposed the application, through his Replying Affidavit dated 18th February 2019. The application was canvassed by way of written submissions. The Plaintiff/Applicant filed its written submissions on 16th April 2019. The Defendant/Respondent despite being allowed adequate time and opportunity to do so failed to file any written submissions in the matter.

BACKGROUND

4. The Plaintiff/Applicant being a dealer in the vehicle rental market for mobility services on 6th February 2019 entered into an International Franchise Agreement (hereinafter “IFA”) with Europcar International Sacco (hereinafter “the Franchisor”) a French Multinational Company. By this Agreement the Plaintiff/Applicant was authorized to use the Franchisors marks and technical know how in Kenya. The Franchise Agreement allowed the Plaintiff/Applicant to carry out business in Kenya using internationally recognized marks owned by the Franchisor.

5. The Defendant who is not a director partner and/or shareholder of the Plaintiff Company assisted the Plaintiff in developing the proposal which led to the Franchise Agreement. The Plaintiff claims that the Assistance offered by the Defendant towards this proposal was purely on a friendship basis. That there existed no promise or intention that such assistance would create a legally binding relationship with the Defendant. The Plaintiff avers that all capital input and investment into the business came from himself and that the Defendant did not

contribute any funds at all towards the business. That on **21st June 2016** the Franchise Agreement was duly executed by **Philemon Mwakitawa** on behalf of the Plaintiff Company. Thereafter the Plaintiff/Applicant set up shop at the **Jomo Kenyatta International Airport (JKIA)** and proceeded to hire vehicles and drivers for purposes of the business.

6. The Plaintiff alleges that on or about **12th January 2019** the Defendant maliciously wrote to the Franchisor a letter intended to revoke the **IFA**. As a result of this letter the Franchisor threatened to revoke the **IFA** due to negative publicity and squabbles between the management. Attempts made with involvement of third parties to resolve the misunderstanding bore no fruit. The Defendant continued to threaten to publish negative material about the Plaintiff/Applicant to the Franchisor. Being apprehensive that they stood to lose the Franchise the Plaintiff/Applicant filed this suit.

7. On his part the Defendant in his Replying Affidavit confirms that he is not a Director/Shareholder of the Plaintiff Company. He admits that he merely acted to assist in developing the proposal that led to the Franchise Agreement. However the Defendant claims that he expended enormous resources towards this end and claims that the Plaintiff owes him not less than **Kshs.12,000,000.00**. The Defendant asserts that he was actively involved in the entire process leading to the execution of the Franchise Agreement and that the Plaintiff acted to **“steal”** the franchise through deceit and calculated moves.

8. The Defendant claims that the two went into the business as equal partners. He claims that despite all the effort he expended towards the realization of the **IFA**, he has not been reimbursed his personal expenditure into the venture nor has the plaintiff honoured their agreement to make the Defendant a shareholder. The Defendant denies that he has acted maliciously in an attempt to sabotage the business stating that he too stands to lose substantially if the business goes under.

ANALYSIS AND DETERMINATION

9. The Plaintiff/Applicant seeks injunctive order against the Defendant. The law governing the issuance of injunctive orders was clearly set out in the case of **GIELLA –VS- CASMAN BROWN [1973] EA** where it was held that the following three ingredients must be proved by a party seeking injunctive orders: -

- a. The Applicant must establish a prima facie case with probability of success at trial.
- b. The Applicant must demonstrate that unless the orders sought are granted he stands to suffer irreparable loss which cannot be adequately compensated by an award of damages.
- c. In event of any doubt the court will decide the case on a balance of convenience.

10. In **CHARTER HOUSE INVESTMENTS LTD –VS-SIMON K SANG & OTHERS Civil Appeal No.315 of 2004**, the Court of Appeal held as follows:-

“Injunction is an equitable and discretionary remedy, given when the subject matter of the case before the court requires protection and maintenance of the status quo. The award of a temporary injunction by Courts of equity has never been regarded as a matter of right, even where irreparable injury is likely to result to the applicant. It is a matter of sound judicial discretion, in the exercise of which the court balances the conveniences of the parties and possible injury to them and to third parties. In the Giella Case (supra) the predecessor of this Court laid down the principle that for one to succeed in such an application one must demonstrate a prima facie case with reasonable prospect of success that he stands to suffer irreparable damage which cannot be compensated for by an award of damages, and that the balance of convenience tilts in his favour.” [own emphasis]

PRIMA FACIE CASE

11. The definition of what constitutes a **“prima facie”** case was given in the case of **MRAO –VS- FIRST AMERICAN BANK OF KENYA LTD & 2 OTHERS [2003] KLR** where it was held:-

“A prima facie” case in a civil application includes but is not confined to a “genuine and arguable case.” It is a case 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.”

12. At this stage it must be remembered that the court is not required to make a definitive pronouncement over the issues in the suit. In **AMERICAN (CYANAMID CO. –VS- ETHICON LTD 1975 UHL1** it was held as follows:-

“It is not part of the Court’s function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which he claims of either party may ultimately defend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial.” [own emphasis]

13. The fact that the Defendant is neither a director nor a shareholder of the Plaintiff Company is not denied. The **CR12** dated **20th March 2012** annexed to the Plaintiff’s Supporting Affidavit dated **31st January 2019** lists the two Directors/Shareholders of the Company as **Anisah Ahmed Mwakitawa** and **Philemon Davis Mwakitawa** only.

14. The Plaintiff/Applicant alleges that the Defendant has written letters to the Franchisor aimed at sabotaging the business. Annexed to the

Plaintiff's Supporting Affidavit is an e-mail dated **30th January 2019** from the Defendant to one **Olivier Boucher** of Europcar. The e-mail is headed "**STATUS OF MATTERS AT EUROPCAR KENYA.**" The e-mail goes on to enumerate certain shortcomings of the Plaintiff's business seeking intervention of the recipient. These are issues which the Defendant ought to have addressed with the Plaintiff itself. The Defendant claims that the Plaintiff is in breach of an agreement to involve him in the business and to transfer shares to the Defendant. Again this is a matter which involves the two parties and one which can only be determined after a full trial of the suit at which evidence will be called. The Defendants action in writing to the Franchisor may have the effect of causing the latter to pull out of the business to the detriment of the Plaintiff/Applicant. On the basis of the above I am satisfied that a prima facie case has been established to warrant the grant of the interim orders being sought.

IRREPARABLE HARM

15. Undoubtedly much capital and financial investment has been ploughed into this business venture. Should the Franchisor move to revoke the **IFA** then the reputation of the Plaintiff will be affected. Reputation is difficult to quantify in monetary terms and such reputation once lost is difficult to salvage.

16. On the other hand the Defendant claims that he is owed some **Kshs.12,000,000.00** by the Plaintiff. This is a sum which is quantifiable and the Defendant if successful at trial can be adequately compensated by an award of damages. I am satisfied that this limb of irreparable harm has been proved.

17. Finally, I find that the balance of convenience tilts in favour of the Plaintiff. In my view the interests of justice will be served by maintaining the status quo. Accordingly, I grant an interim injunction in terms of **Prayer (c)** of the Notice of Motion dated **30th June 2019**. Costs to be met by the Defendant/Respondent.

Dated in Nairobi this 14th day of May 2020.

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Justice Maureen A. Odero