



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL CASE NO. 478 OF 2017

LALITABEN SHARAD PATEL.....1ST PLAINTIFF

VIJENDRA SHARAD PATEL2ND PLAINTIFF

URVESH SHARAD PATEL3RD PLAINTIFF

HASMITA SHARAD.....4TH PLAINTIFF

*(All Plaintiffs suing on behalf of themselves as Partners of Film Corporation of Kenya except **SHARAD CHANDRA DHAYABHAI PATEL**)*

-VERSUS-

SHARAD CHANDRA DYABHAI PATEL..... DEFENDANT

RULING

1. This case is essentially a family feud over business partnership known as Film Corporation of Kenya (FCK). Lalitaben Sharad Patel is the 1st Plaintiff and wife of the Defendant. The 2nd, 3rd and 4th Plaintiffs are the children of that marriage. The Defendant is the husband of the 1st Plaintiff and the father of the 2nd to 4th Plaintiffs.
2. The 1st Plaintiff in this case alleges, in great detail, alleged ‘abuse’ and wrong doings of the Defendant in respect to the partnership FCK. That partnership business was started in 1966. The 1st Plaintiff alleges that she and the Defendant were initial partners. The Defendant, to the contrary, alleges that he started that business and subsequently invited the 1st Plaintiff into the business. There is also controversy whether or not their children, the 2nd to 4th Plaintiffs are partners of FCK.
3. Closely related to the dispute is the jointly owned properties at Hill View Estate, which are registered in both the 1st Plaintiff’s and the Defendant’s names.
4. The 1st Plaintiff in alleging abuse of the partnership, by the Defendant, has set out detailed alleged financial misappropriation and mismanagement by the Defendant. The 1st Plaintiff has set out instances when she and the children have had to pay large sums of money because of that alleged mis-management. She, the 1st Plaintiff, now fears that their jointly own property, which she uses as her residence will be sold because of the mounting debts of FCK. She therefore moved this Court by Notice of Motion dated 23rd November 2017 whereby she seeks injunction to restrain any person or entity, which may have a claim against FCK, from attaching, selling or alienating, disposing or dealing with L.R. No.12325/84 and L.R.15044.

ANALYSIS AND DETERMINATION

5. In my analysis of the application before me I could very easily reproduce the copious submissions and affidavit evidence but I dare say if I was to do so I would be in danger of considering or delving on issues which should be considered at the full trial. I will not delve in those issues in keeping with the holding, by the Court of Appeal in the case **MBUTHIA – V- JIMBA CREDIT FINANCE CORPORATION 1988 eKLR** where the Court stated:

“The correct approach in dealing with an application for injunction is not to decide the issue of fact, but rather to weigh up the relevant strength of each side’s propositions. There is no doubt in my mind that the learned judge went beyond his proper duties and has made final findings of fact on disputed affidavit.”

6. With the above caution in mind I will begin by considering the essence of the prayers made by the 1st Plaintiff by her application.

7. In prayer 2 of the 1st Plaintiff's application she seeks the order:

“That a temporary injunction do issue restraining any person or entity that may have lawful claim or judgment against film corporation of Kenya from attaching L.R. No. 12325/84 and L.R. No.15044 in whichever other way to the detriment or loss of the first Plaintiff Lalitaben Sharad Patel, which a joint registered owner of the said parcel of land with the Defendant.”

8. That prayer is informed by the 1st Plaintiff's allegation that due to Defendants' poor management of FCK various legal claims have been made against FCK; and because she and the other Plaintiffs are partners of that business there is the danger of monetary decrees being executed against them; and if that occurs the 1st Plaintiff is apprehensive of attachment of immovable properties, which are in the joint names of herself and the Defendant.

9. The Defendant, correctly in his submission, stated that the 1st Plaintiff cannot seek injunction against persons who are not parties in this suit. That submission is supported by the provision of Order 40 Rule 1 (a) of the Civil Procedure Rules which provides the instances in which a temporary injunction may be issued. That Rule provides:

“Where in any suit it is proved by affidavit or otherwise,

a) That any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit ...”
(emphasis mine).

10. That Rule shows that an injunction can only be issued against a party to the suit. Looking again at the above prayer, it becomes clear the 1st Plaintiff injunction is directed at everyone out there, that is the entire world.

11. When one considers that such an order would affect persons, who are not parties and have not been heard it becomes clear that such an order cannot be issued. It follows that that prayer fails.

12. By the 3rd prayer the 1st Plaintiff seeks that this Court do direct that anyone with any lawful claim or judgment against FCK to seek satisfaction of that claim/judgment against the Defendant.

13. The 1st Plaintiff errs to suggest that this Court can make orders that would be binding in other cases before other Courts. Such an order cannot be issued at interlocutory stage. It fails.

14. Similarly the fourth prayer which seeks that this Court do order the Defendant to indemnify the Plaintiffs for any liabilities that may have arisen in respect to FCK.

15. The parties in this action seek the determination of whether FCK should be dissolved and who are the rightful partners of that business. In the light of those prayers, in the main suit, the Court cannot at this interlocutory stage, order the Defendant to indemnify the Plaintiffs. That prayer too fails.

16. On the fifth prayer the 1st Plaintiff seeks leave to serve the Defendant out of this jurisdiction.

17. It is not clear if that prayer is still alive for consideration because the Defendant filed a Memorandum of Appearance and defence which documents show the Defendant's address of service is through his Advocate base in Nairobi Kenya. It therefore, seems the fifth prayer has been overtaken by events.

18. Having however, gone through the pleadings and the parties affidavit evidence it is clear to me that this is a case that should be heard on priority basis. At the reading of this Ruling a date for case management conference will be given to the parties.

19. On costs, since this is a matter between family members and the matter is still at interlocutory stage, I will order the costs of the Notice of Motion dated 23rd November 2017 be in the cause.

20. In the end the Notice of Motion dated 23rd November 2017 is dismissed and the costs thereof shall be in the cause. Parties will now be given a date for Case Management Conference before the Deputy Registrar.

Orders accordingly.

DATED, SIGNED and DELIVERED at NAIROBI this 22ND day of MAY, 2019.

MARY KASANGO

JUDGE

Ruling Read and Delivered in Open Court in the presence of:

Sophie..... COURT ASSISTANT

..... FOR THE 1ST PLAINTIFF

..... FOR THE 2ND PLAINTIFF

..... FOR THE 3RD PLAINTIFF

.....FOR THE 4TH PLAINTIFF

.....FOR THE DEFENDANT