



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL CASE NO. 393 OF 2017

SIMON HORNER.....APPLICANT

-VERSUS-

MICHAEL JOHN MWAURA.....1ST RESPONDENT

EPILSON REGISTRARS.....2ND RESPONDENT

RADIO FREQUENCY SYSTEMS (E.A.) LIMITED....3RD RESPONDENT

THE REGISTRAR OF COMPANIES.....4TH RESPONDENT

RULING

1. Judgment was delivered in this matter on 20th September 2018. This is a case which involved a Director/shareholding dispute, of Radio Frequency Systems E.A. Limited, between Simon Horner the Applicant and Michel John Mwaura the 1st Respondent. The Court, on 20th September 2018, in making the determination on that disputed ordered that within 14 days thereof funds that were held in joint bank account of the Advocates for the Applicant and the 1st Respondent, Coulson Harney LLP and Nduati & Company Advocates respectfully, be transferred to the 3rd Respondent Company's account at Equity Bank Limited.

2. What is before Court is a Notice of Motion application dated 25th January 2019. It is filed by the Applicant. The application principally seeks two prayers. In the first prayer the Applicant seeks for a mandatory injunction to issue to compel Nduati & Company Advocates, to within three days, issue written instructions for the transfer of all the money held in the joint account to the 3rd Respondent's bank account. In the second prayer the Applicant seeks an order that the deputy registrar of this Court do issue those instruction on behalf of Nduati & Company Advocates.

3. The money the subject of this application was deposit, before judgment was delivered, into joint interest earning account following a consent of the parties. The said money was earnings of the 3rd Respondent Company. Following that consent the parties Advocates', as stated before, opened the joint account where the said amount was deposited. It is that amount that the judgment of this Court of 20th September 2018 was directed, when the Court ordered that the same be withdrawn from the joint account and be deposited into the account of the 3rd Respondent. The Applicant by the present application states that the orders he seeks have been necessitated by the firm of Nduati & Company Advocate's failure to issue instructions to NIC Bank, where the joint account is held, to withdraw the said money.

4. The Applicant by his affidavit in support of the application deponed that the law firm of Nduati & Company Advocates, even though it was requested failed and/or refused to give instruction for the transfer of the funds from the joint account. That as a consequence, even though the NIC bank is willing to comply with the Court judgment/decreed it however, can only act on instructions that are executed in accordance with the joint account signature mandate. Further that the bank is willing to comply with any other order this Court may make.

5. The application was opposed by the 1st and 3rd Respondents. That opposition to the application is through Preliminary Objection, grounds of opposition and the 1st Respondent's replying affidavit. In those documents, the Respondents oppose the application on the grounds that the Court, having delivered the judgment in this matter on 20th September 2018, it thereafter became *functus officio*. That an order cannot be made against Nduati & Company Advocates because that firm was not a party in these proceedings. Further that the Applicant had failed to demonstrate special circumstances to warrant the issuance of a mandatory injunction. That the 3rd Respondent's account is solely operated by the Applicant who is not a citizen of this country and does not hold a work permit.

6. In oral submission, the learned Advocate Mr. Gitonga, for the 1st and 3rd Respondents, submitted in support of the grounds raised above.

DISCUSSION AND DETERMINATION

7. I believe the Respondents erred to argue that the Applicant ought to show special circumstances before mandatory injunction is granted. Courts have held over and over again that it is because of the likelihood of dire effect of mandatory injunction that, at interlocutory stage, the Courts should only grant such order when a party shows special circumstances. This is what the Court stated, in an authority cited by the Respondent, in the case **MAHER UNISSA KARIM V EDWARD OLUOCH ODUMBE [2015] eKLR** as follows:

“A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances and then only in clear cases either where the Court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could easily be remedied or where the defendant had attempted to steal a march on the plaintiff. Moreover, before granting a mandatory injunction, the Court has to feel a high sense of assurance that at the end of the trial it would appear that the injunction had been rightly granted, that being a different and higher standard than required for a prohibitory injunction.”

The above decision cited with approval by the Court of appeal in the case of **SHARIEF ABDI HASSAN VS NADHIF JAMA ADAN CA 121/2005 (2006) eKLR** by further observing that:-

“The Courts have been reluctant to grant mandatory injunction at the interlocutory stage. However, where it is prima facie established as per the standard spelt out in law as stated above that a party against whom a mandatory injunction is sought is on the wrong, the Courts have taken action to ensure that justice is meted out without the need to wait for the full hearing of the entire case. That position could be taken by the Courts in such cases as those”

8. In this case, however, a mandatory injunction is sought after judgment and with a view to enforcing that judgment. The Applicant does not have to meet the high standards of granting a mandatory injunction and all the Applicant needs to do is to point to the judgment of 20th September 2018 and say it has not been obeyed and hence why mandatory injunction ought to be issued.

9. The argument of the Respondents that the order sought cannot be issued against Nduati & Company Advocates because that firm is not a party in this cause is lost to me. Nduati & Company Advocates are the Advocates who act for the 1st and 3rd Respondent in this matter. But perhaps more importantly it is that firm that opened the joint account (on behalf of its clients, 1st and 3rd Respondent) to hold funds that rightly belong to the 3rd Respondent. If the order sought cannot be issued against the said Law firm, the firm that gave signature mandate to the bank when the joint account was opened, who else can it be issued to. That argument is rejected.

10. The Respondent submitted that this Court, on delivering the judgment on 20th September 2018, it became *functus officio*. That the only other application it can entertain is either review or contempt.

11. The Respondent chose a narrow view to this matter. Judgment was delivered on 20th September 2018, by this Court. By that judgment this Court ordered for the transfer of the funds from the joint account to the 3rd Respondent's account. The Applicant in approaching this Court does not seek this Court to re-entertain the merits or otherwise of the dispute on Directorship/Shareholding of the 3rd Respondent, which is what was before Court at the trial. Rather the Applicant seeks this Court to determine how the decree it passed can be satisfied. This is permitted under section 34 of the civil procedure act which provides:

“All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree and not by a separate suit.”

12. The Court of Appeal in the case **GITHUNGURI DAIRY FARMERS CO-OPERATIVE SOCIETY V ERNIE CAMPBELL & CO. LTD & ANOTHER [2018]** had occasion to consider that section and stated:

“In reply to the appellant's contention that the High Court stood functus officio once it adopted the award and therefore had no jurisdiction to delve into the matter thereafter, the 1st Respondent submitted that it did not seek to re-engage the Court on the merits of the decision of the arbitration or on the merits of the application to enforce the arbitral award. Having established that the appellant was the 2nd Respondent's majority shareholder, its application to have its assets satisfy the decree in its favour became necessary. The application was hinged on section 34 of the Civil Procedure Act which provides that all questions arising between the parties to the suit in which the decree was passed or relating to the decree has to be determined by the Court executing the decree and not by a separate suit.”

13. To respond to the Respondents this Court is not *functus officio* in as far as the present application is concerned because the application seeks to enforce execution/satisfaction of the decree herein.

14. What however I do find the Court is *functus officio* over is the determination, the Respondents sought from this Court, that the Applicant not being a citizen of this country and not having a work permit cannot operate the 3rd Respondent's account. The Court determined who is/are the rightful Directors/shareholders of the 3rd Respondent and cannot be called upon to determine the operation of the bank account of the 3rd Respondent. Not at this stage.

15. Following the above discussion I do hereby find that there is merit in the application. The costs of the application will follow the event and will be borne by the firm of Nduati & Company Advocates, who although were given an opportunity failed to obey the order of this Court of 20th September 2018.

16. In the end the order I grant is as follows:-

a) A mandatory injunction is hereby issued compelling the firm of Nduati & Company Advocates, within seven (7) days from the date of this order to issue written instructions for the transfer of all money held in the bank Account Number 1005374282 held at NIC Bank Limited, Riverside Branch, in the joint names of COULSON HARNEY LLP and NDUATI & COMPANY ADVOCATES, to bank account number 0170296936184 held at Equity Bank Limited, Community Branch, in the name of RADIO FREQUENCY SYSTEMS LIMITED.

b) In the event of Nduati & Company Advocate’s failure to act as ordered in (a) above the Deputy registrar of this Honourable Court shall issue written instructions to NIC Bank Limited, in place of Nduati & Company Advocates, to transfer all money currently held in bank account number 1005374282 held at NIC Bank Limited, Riverside Branch to Account Number 0170296936184 held at Equity Bank Limited Community Branch in the name of Radio Frequency Systems Limited. In this regard NIC Bank Limited shall be required to act on the instructions of the Deputy Registrar of this Honourable Court in the same manner as they would have acted had the written instructions been given by Nduati & Company Advocates.

c) The costs of the Notice of Motion dated 25th January 2019 shall be borne by Nduati & Company Advocates.

DATED, SIGNED and DELIVERED at NAIROBI this 15TH day of MAY, 2019.

MARY KASANGO

JUDGE

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

Sophie.....COURT ASSISTANT

.....FOR THE APPLICANT

.....FOR THE 1ST RESPONDENT

.....FOR THE 2ND RESPONDENT

.....FOR THE 3RD RESPONDENT

.....FOR THE 4TH RESPONDENT