



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D. S. MAJANJA J.

CIVIL CASE NO. E – 80 OF 2019

BETWEEN

MACK MADOU COULIBALY.....PLAINTIFF

AND

GILBERT OTIENO NYANDEJE..... 1ST DEFENDANT

DANIEL MALUKI NGULI.....2ND DEFENDANT

ENOVISE LIMITED.....3RD DEFENDANT

RULING

Introduction

1. The plaintiff has filed two Notices of Motion dated 28th June 2019. The first application is made, inter alia, under **section 5** of the **Judicature Act**, **section 36** of the **High Court (Organisation and Administration) Act** and it seeks the following order:

[c] THAT the 1st and 2nd Defendants, GILBERT OTIENO NYANDEJE AND DANIEL MALUKI NGULI be detained in prison for such period as this Honourable court shall deem necessary for being in contempt of court or for so long as they remain in contempt of the orders given herein on 11th April 2019.

2. The second application is made, inter alia, under **sections 80** and **83** of the **Civil Procedure Act**, **Order 40 rule 3** and **Order 45 rule 1** of the **Civil Procedure Rules** and seeks the following order:

[c] THAT the orders made by Honourable Justice Francis Tuiyott made on 3rd June 2019 to the effect that the Plaintiff give the 2nd Defendant with the administration rights of the domain name and email of the 3rd Defendant be reviewed and set aside for want of jurisdiction.

Background and procedural history

3. Both applications are supported by the depositions of Mack Madou Coulibaly. They are opposed by the respondents through the replying affidavit of Daniel Maluki Nguli. It is apparent from the orders sought, the applications concern interlocutory orders made by the court. Before I deal with parties' arguments I shall set out the nature of the dispute and the procedural history of the matter as is relevant to the two applications.

4. The parties agree that the 3rd defendant ("the Company") was incorporated in Kenya by Kennedy Omondi Okello, the 1st and 2nd defendants on 7th August 2015. The plaintiff became a shareholder when he purchased all the shares from Kennedy Omondi Okello and a share from the 1st defendant. According to the plaintiff, the shareholders then registered another company **Enovise Incorporated** ("**Enovise Inc.**") in the United States. In due course, the shareholders disagreed on the running of the Company on the basis of what the plaintiff alleged was misuse of the Company's assets, fraudulent accounting and misrepresentation of the Company accounts to the plaintiff by the 1st and 2nd

defendants. Following these differences, the plaintiff filed this suit seeking various reliefs including a permanent injunction against restraining the 1st and 2nd defendants from, inter alia, accessing the Company's bank accounts, removal of the 1st and 2nd defendant's as directors of the Company, order of restitution of monies misappropriated by the 1st and 2nd defendants from the Company and an order that the 1st and 2nd defendants be ordered to pay the plaintiff his investment amounting to USD 182,290.82.

5. The plaint was accompanied by a Notice of Motion dated 8th April 2019 made, inter alia, under **Order 40** of the **Civil Procedure Rules** and **sections 238** and **239** of the **Companies Act, 2015**. In the main, the plaintiff sought several orders in the nature of injunctions seeking to restrain the 1st and 2nd defendants from dealing with the Company's bank accounts. He also sought an order for a forensic audit to be conducted in the Company's financial affairs.

6. After the Notice of Motion dated 8th April 2019 was filed, it was placed before Tuiyott J., who directed that it should be mentioned on 11th April 2019. On that date and after hearing the advocates for both parties, he made the following orders;

[1] *THAT the Respondent be and is hereby granted 14 days to file responses.*

[2] *THAT an order be and is hereby issued for an in depth forensic audit of the 3rd Defendant's financial statements, to carrying out the said audit, and to report its finding to this court within 15 (fifteen) days, or within such reasonable period of time as shall be adequate to perform the audit.*

[3] *THAT that the assurance given by Mr Mbugua is recorded and he shall be held to his word.*

[4] *THAT hearing on 20th May 2019.*

7. After a few mentions, the matter was once again placed before Tuiyott J., on 3rd June 2019 and after hearing the parties' advocates, he made the following orders:

[1] *THAT hearing of the Notice of Motion dated 8th April 2019 on 30th July 2019.*

[2] *THAT the Plaintiff to file and serve a supplementary affidavit within 14 days.*

[3] *THAT the Plaintiff shall forthwith grant the 2nd Defendant with the Administration rights of the Domain name and Email within 48 hours of now (9.19 a.m).*

Application for contempt

8. It is the aforesaid orders that have given rise to the two applications for consideration. I will deal with the first application which is primarily an application for contempt and it is grounded on the contention that the 1st and 2nd defendants ("the defendants") have failed to comply with the request for documents dated 3rd June 2019 sent to their advocates by the plaintiff's advocates seeking specific documents necessary for the audit. According to the plaintiff's deposition, the defendants' counsel on record acknowledged receipt of that letter but declined to respond to the request on the ground that the plaintiff had not complied with the orders of 3rd June 2019. The plaintiff contends the court orders were clear that the defendants were to provide all documents to the plaintiff's appointed auditor in order to conduct an in-depth forensic audit within the time limited by the court. Counsel emphasized that the order was clear and was made in the presence of counsel for the defendants who had given an unequivocal undertaking to ensure compliance with the order and since the defendants had deliberately and blatantly disobeyed the orders, they were liable for contempt. Counsel pointed out that there was no basis for imposing an additional condition for compliance with the order that was clear in its direction.

9. In response to the plaintiff, the 2nd defendant, in his deposition sworn on 24th July 2019, denied that allegation of contempt. He stated that he had met the plaintiff's auditors on 23rd April 2019 and agreed on that the auditors would come up with the list of what they required and that he undertook to supply all the information and documents in his possession. He stated that apart from being available for any questions, he availed office space as well files for the investigation by the auditors. He accepted that the defendant's advocates received a letter from the plaintiff's advocates requiring 44 items which were required by his advocates responded comprehensively by the letter dated 30th May 2019 by answering all queries including stating what has been availed and what was impossible to avail. On the basis of these facts, counsel for the defendants submitted that there was no contempt in the circumstances and in any case, the auditor had done the audit but had not submitted the report. Counsel also submitted that the plaintiff had not come to court with clean hands as he had disobeyed the order of 3rd June 2019.

10. Both parties cited several authorities to support their respective positions in the matter. In addition, the defendants raised technical defences to the application which I have deliberately avoided in order to deal with the substance of the case application. The order subject of the contempt proceedings directed that, "*an in depth forensic audit of the 3rd Defendant's financial statements*" be carried out. Although the order was not directed at the defendants, it is not in doubt that the defendants were duty bound to assist the plaintiff's appointed auditor to carry out the same. The 2nd defendant has positively deponed on the actions taken to accommodate the auditor and provide the necessary documents and information and have stated that they do not have some of the documents requested.

11. In order to prove contempt, the applicant must establish three conditions. First, it must be shown that the terms of the order are clear and unambiguous. Second, the defendant must have notice of what is required of him and last, that the defendant has breached the order. Although it refers to injunctions, the following passage in the **Law of Contempt (3rd Ed), Butterworths 1996, p. 560**, is no less applicable to any other orders. The learned authors observe that:

Thus although persons are under a duty to comply strictly with the terms of an injunction, the courts will only punish a person for contempt upon adequate proof of the following points. First, it must be established that the terms of the injunction are clear and unambiguous; secondly, it must be shown that the Defendant has had proper notice of such terms; and thirdly, there must be clear proof that the terms have been broken by the Defendant. There is also a fourth issue, namely, the mens rea required in such cases. We will also refer, fifthly, to the question of who is responsible for the breach.

12. There is no dispute that the defendants had knowledge of the order directing an audit as the 2nd defendant deponed that he actually took steps to facilitate the plaintiff's appointed auditor. What is in issue is whether the order was clear and unambiguous in its terms regarding what it required the defendants to do or refrain from doing. The basis of this requirement was well stated by the Court of Appeal in **Jihan Freighters Limited v Hardware & General Stores Limited MLD CA Civil Appeal No. 11 of 2015 [2015] eKLR** as follows:

The rationale of the requirement that a court order must be clear, precise and easy to understand is founded on the self-evident fact that breach of a court order may result in contempt of court proceedings as well as the severe sanctions, including loss of liberty or property, that are visited upon a contemnor. Accordingly, the grave consequences that attend a violation of a court order ought not to be casually visited upon a person unless and until it is clear what the court order required him to do or to abstain from doing.

13. The order was not directed to the defendants hence it is unclear what the defendants were required to do and in what manner the audit was to be facilitated. Of course, the tenor of the order is, as I have state elsewhere, that the defendants were required to assist in carrying out the order. I have no doubt that the defendants would still be liable for contempt if they actively and deliberately impeded that implementation of that order. I cannot say from the totality of the material before me that the defendants are guilty of contempt of court. In reaching this conclusion, I have taken into account the fact that the auditor has not produced a report of the audit based on the documents available.

14. I therefore dismiss the motion seeking to commit the 1st and 2nd defendants for contempt. I note that at the appropriate time, the plaintiff will be required to prove his claim hence the order for audit was interlocutory. It was not intended to be conclusive or a substitute for the plaintiff establishing his claim. I also note that the parties are entitled to discovery of documents. I would therefore direct the auditor to file the report of his finding within 7 days from the date hereof.

Application for review

15. I now turn to the next application which is in the nature of an application for review. The plaintiff contends that the order of 3rd June 2019 directing the plaintiff to grant the 2nd defendant administration rights of the domain name and email of the Company was made erroneously as it was not based on any evidence that the defendants did not have access. The plaintiff contends that the domain name is a digital asset owned by **Enovise Inc.** registered in the United States of America where it is also hosted.

16. The plaintiff deposed that on 17th January 2019, the Company transferred all its assets, including the domain name, to **Enovise Inc.** incorporated in the USA. He deposed that **Jighi Inc.** also incorporated in USA is the web host and domain manager of its email servers and that he had been paying for hosting the domain name. The plaintiff contends that it is only **Enovise Inc.** that has the rights to authorise, limit and deny access to any such persons including the 2nd defendant and not the plaintiff. The plaintiff contends that the 1st defendant has never had administration rights but has been accessing the domain and emails without authorization while the 2nd Defendant only obtained limited administration rights in 2018 but has been exceeding his authorised access. He also states that defendants have never been unable to access their emails as alleged. The plaintiff argues that since the digital asset is owned, operated and managed in the USA, this court lacks jurisdiction over it.

17. The 2nd defendant deponed that the Company purchased the domain name **www.enovise.com** from Kenyan incorporated company, Sasahost Limited until the plaintiff joined the Company. Later on, the domain name was migrated to **godaddy.com**. The 2nd defendant stated that he was an administrator of the domain until 7th May 2019 when he was removed by the plaintiff following the dispute hence he was unable to access the company emails. The defendants' position is that as co-directors of the Company, they had equal rights to access the domain as they have always had access. The defendants urge that in light of the disobedience of the order of the court by denying them access to the domain, the plaintiff is in contempt of the order and is not entitled to relief.

18. In response to the plaintiff's contention that the court lacks jurisdiction to adjudicate on the digital assets owned, operated and managed in the USA, the defendants assert that the Company is incorporated in Kenya, that the defendants are Kenyan citizens, that the business of the Company is conducted within Kenya and the assets ownership agreement is governed by the laws of Kenya.

19. The plaintiff filed a further supporting affidavit to the 2nd defendant's in which he deponed that the defendants illegally transferred the domain name to themselves and that he and **Jighi Inc** filed a complaint in the United States District Court Northern District of California Case No. 5:19-cv-3183. He further stated that the court issued a subpoena to the Registrar of the domain name **Godaddy.com** to provide necessary information regarding the changes and transfer of that domain name to the defendants. The plaintiff urged that the domain name was wholly owned by **Enovise Inc** which was incorporated in the USA and that the digital assets are exclusive within the jurisdiction of the USA. The plaintiff deposed that he was unable to comply with the order issued by Tuiyott J., on 3rd June 2019 as a result of the said illegal transfer of the domain name by the defendants.

20. The application is one for review under **section 80** of the **Civil Procedure Act** and **Order 45** of the **Civil Procedure Rules** and the grounds upon which the court may review its order are as follows:

(a) There must be discovery of a new and important matter which after the exercise of due diligence, was not within the knowledge of the applicant at the time the decree was passed or the order was made; or

(b) There was a mistake or error apparent on the face of the record; or

(c) There were other sufficient reasons; and

(d) The application must have been made without undue delay.

21. The thrust of the plaintiff's application is about the operation and management of the domain name and the jurisdiction of the court to direct the plaintiff to give the 2nd defendant administration rights of the domain name and email of the Company. It is not disputed that the Company purchased the domain name and according to the plaintiff, the domain name was part of its assets transferred to **Enovise Inc** by an agreement dated 17th January 2018.

22. However as to who controls the domain name there two conflicting positions. The first concerns the operations and management of the Company in which the plaintiff is a minority shareholder vis-à-vis the 1st and 2nd defendants. The second is the agreement between the shareholders dated 17th January 2018 in which the assets of the Company were transferred to **Enovise Inc**. Although the defendants deny that they are involved in **Enovise Inc**, the plaintiff's own deposition and documents, the plaintiff and defendants are directors of **Enovise Inc**. hence that they are entitled to participate in the affairs of the company. Based on the two grounds I cannot say that the defendants would not be entitled to administer the domain name. Since I have not heard the case in full, I cannot say at this stage that defendants are not entitled to administer the domain name and therefore set aside the orders issued by Tuiyott J., in that regard.

23. The plaintiff raised the issue that the domain name was a matter subject to jurisdiction of the court in the USA. I would only point out that this suit was commenced by the plaintiff within this jurisdiction hence he cannot argue that this court lacks jurisdiction or that he is not subject to this court's jurisdiction. At any rate, I note that the suit in the US District Court Northern District of California was filed on 6th July 2019 which is slightly over a month after the order issued by Tuiyott J. That claim is almost on all fours with the present claim and in it the plaintiff accuses the 1st and 2nd defendants of theft and fraud by inducing him to invest in the Company. Since the plaintiff is the one who filed this suit within this jurisdiction, he cannot turn around and deny that the court has jurisdiction. In the circumstances for the reasons I have stated, I decline to review the order issue by Tuiyott J., in relation to the domain name as I am not satisfied that the application falls within the purview of conditions for grant of an order of review.

24. In conclusion, I dismiss both Notices of Motion dated 18th June 2019 with costs to the defendants. I direct the auditor to file the audit report as directed by the court on 11th April 2019 within **seven (7) days** from the date hereof.

DATED and DELIVERED at NAIROBI this 19th day of NOVEMBER 2019.

D. S. MAJANJA

JUDGE

Ms Ngunjiri instructed by Njeri Ngunjiri Advocates for the plaintiff.

Mr Mbugua instructed by Namachanja and Mbugua Advocates for the defendants.