



## REPUBLIC OF KENYA

### IN THE HIGH COURT OF KENYA AT KITUI

#### CIVIL SUIT NO. 9 OF 2017

**KINATWA GROUP CO. LIMITED.....PLAINTIFF**

**VERSUS**

**FRANCIS MULWA MUTISYA.....1<sup>ST</sup> DEFENDANT**

**GEORGE KIMOTHO ILEVE.....2<sup>ND</sup> DEFENDANT**

**GEORGE MUNYAO KAWAYA.....3<sup>RD</sup> DEFENDANT**

**CYRUS MUATHA KANYALU.....4<sup>TH</sup> DEFENDANT**

**MARY NYAMBURA MAINA.....5<sup>TH</sup> DEFENDANT**

#### RULING

1. The Applicant approached this Court by way of Notice of Motion seeking a restraining order to issue against the Respondents prohibiting them from closing the offices of the Applicants (Plaintiffs) situated at **Mwalimu House, Kitui** and a 'kiosk' at the bus park/stage or taking over or interfering with the Plaintiff's business.
2. The application is premised on grounds that: The Applicant is licenced by the Communication Authority of Kenya to operate courier services as a National Courier Services Provider. In a mistaken belief that the business is run by **M/s Kinatwa Co-operative Savings and Credit Society Limited**, on the **9<sup>th</sup> September, 2017** the Respondents trespassed and closed the said offices in a bid to take over; the Respondents have no interest in the Applicant, who is in custody of thousands of parcels, letters and documents from third parties for transmission; Any interference is likely to lead to loss or delay in such documents. This will make the Applicant suffer irreparable damages owing to third party claims.
3. **Simon M. Mwanthi**, a Director of the Applicant swore an affidavit in support of the application where he deponed that the Applicant Company was registered as a Limited Liability Company under the companies Act on the **2<sup>nd</sup> October, 2014**. The Respondents are not shareholders of the company. The Applicant are licenced to run courier services and for purposes of its operation it has leased two (2) premises in Kitui Town, an office on **Mwalimu House** and kiosk at Kitui Bus Park/Stage.
4. That on the **9<sup>th</sup> September, 2017**, following a meeting of **Kinatwa Co-operative Savings and Credit Society Limited (Sacco)**, the Respondents purported to have been elected as the officials of the Sacco. Immediately after, they proceeded to the offices of the Applicant and closed it in an attempt to take over the business in a mistaken belief that the Sacco has an interest in the said business, an action that is unlawful and will make the Applicant suffer irreparable damages.
5. The 1<sup>st</sup> Respondent having been authorized by his fellow Respondents deponed an affidavit in reply. They denied having interfered with the Applicant's business. He averred that the Applicant was incorporated discreetly from Sacco members by the then officials of **Kinatwa Sacco Limited** for perpetuating fraud by using the Sacco vehicles to ferry parcels for their own selfish gain. That no premises have been rented by the Applicant.
6. Further, he averred that following an inquiry by the Commissioner of Co-operatives, the Sacco members withdrew their vehicles from the parcel business operated by the Applicant leaving it an empty shell. That being leaders of the Sacco they have no interest in the affairs of the Applicants and the premises that they (Respondents) operate from are leased by the Sacco which operates a distinct parcel service pursuant to a provisional licence issued by the Communication Authority of Kenya. That the original licence for transporting parcels was issued to the Sacco but was fraudulently transferred to the Applicant on **2<sup>nd</sup> February, 2017** without a resolution of Sacco members. That the Applicant's Directors can continue operating their parcel business without using the **Kinatwa Sacco Limited** vehicles as the two (2) are different entities. They called for dismissal of the application.

7. The application was canvassed by way of written submissions.

8. It was submitted on behalf of the Applicant that it has demonstrated that it is a legal entity duly registered under the Companies Act and none of the Respondents are its shareholders or directors. That it has been authorized to carry on the business of transportation and delivery of parcels between **Nairobi** and **Kitui**. That it has leased two (2) offices in **Kitui** and continues to pay rent.

9. That following the illegal takeover of the Sacco by the Respondents on the **9<sup>th</sup> September, 2017**, they invaded the office of the Applicant at **Mwalimu House** and ejected the Applicant's employees. That the assertion that the Applicant was registered fraudulently and that the Respondent operates its courier business is a mere allegation as there is no counterclaim filed in respect of the suit. That no evidence of lease of premises by the Respondents and licence issued has been provided therefore they remain without authority to operate any courier services.

10. The Applicant submitted further that the invasion of its property was in violation of the rights to property. It was argued that a *prima facie* has been established with a probability of success. To buttress the argument the Applicant cited the case of **Flex Construction Solutions LTD vs. Verondall Court Limited (2012) eKLR** where **Odunga J.** stated thus:

*“It is the business of the Court, so far as possible, to secure that transitional motions before the court do not render nugatory the ultimate end of justice..... The argument that the law governing the grant of injunctive relief is case in stone is not correct, for the law has always kept growing to greater levels of refinement, as it expands, to cover new situations not exactly foreseen before. Traditionally, on the basis of the well-accepted principles, the court has had to consider the following questions before granting injunctive relief: (i) Is there prima facie case with a probability of success? (ii) does the applicant stand to suffer irreparable harm, if relief is denied? (iii) on which side does the balance of convenience lie? Even as those must remain the basic tests, it is worth adopting a further, albeit rather special and more intrinsic test which is now in the nature of general principle. The court, in responding to prayers for interlocutory injunctive relief, should always opt for the lower rather than the higher risk of injustice..... Although the court is unable at this state to say that the applicant has a prima facie case with a probability of success, the court is quite convinced that it will cause the application irreparable harm if his prayers for injunctive relief are not granted; and in these circumstances, the balance of convenience lies in favour of the applicant rather than the respondent. There would be a much higher risk of injustice if the court found in favour of the defendant, that if it determined this application in favour of the applicant.”*

11. The Respondents on the other hand submitted that they were not interested in the property of the Applicant or how the operations are conducted. That the Applicant which was incorporated by the former officials of the Sacco was not a business enterprise of the Sacco. That the officials were using the Sacco vehicles to transport parcels without approval by the members of the Sacco and were voted out of the office as a result.

12. That the Applicant is required to establish that it has leased the premises at **Mwalimu House**, and the kiosk at a Bus Park and that they have been paying rent. That an injunction has to be specific and no amorphous. That receipts annexed as evidence were issued a week before the instant suit was filed. The issuers have no nexus with the case. That the Respondents have stated that they have no interest in the business of the Applicant and are not interfering with the same. They concluded by stating that if an injunction issues at this stage it will conclude the suit.

13. It is argued by the Respondent that issuance of the injunction sought at this stage it will have the effect of determining the main prayer in the primary suit.

14. Looking at the pleadings the Plaintiff seeks the relief of a permanent injunction, special and general damages and costs. At this stage the Applicant is seeking a temporary or interim injunction that will be in operation until a further order is granted after hearing and determination of the case. This will be a mere order as opposed to a final decree if ordered determining the rights of the parties herein.

15. The principle of granting injunctions were restated in the case of **Nguruman Limited vs. Jan Bonde Nielsen & 2 Others CA No. 77 of 2012** thus:

*“In an interlocutory injunction application, the applicant has to satisfy the triple requirements to:*

*a) Establish his case only at a prima facie level;*

*b) Demonstrate irreparable injury if a temporary injunction is not granted; and*

*c) Allay any doubts as to (b) by showing that the balance of convenience is in his favour.”*

16. A *prima facie* case was stated in the case of **Mrao LTD vs. First American Bank of Kenya LTD & 2 Others Civil Appeal No. 39 of 2002 (2003) eKLR** thus:

*“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.”*

17. The Applicant herein has demonstrated that it was registered as a Limited Company on the **2<sup>nd</sup> October, 2014** and a Certificate of Incorporation No. **CPR/2014/162509** issued. Its physical registered address is given as **LR Number 005/98 Tunai Street, Afya Building Nairobi**. The Respondents herein are not shareholders of the Applicant. Copies of receipts tendered in evidence were issued to the

Applicant on account of office rent and **stall 15** at the **New Bus Park** for the months of **August** and **September, 2017**.

18. It was averred that on the **9<sup>th</sup> September, 2017** the Respondents closed the offices of the Applicant in an attempt to take over their business. This is what prompted them to seek legal redress on the **13<sup>th</sup> September, 2017**. Annexure "**FMM1**" to the Replying Affidavit shows that the 1<sup>st</sup> – 4<sup>th</sup> Respondents are Members of the New Management Committee of the Sacco which is a distinct entity from the Applicant.

19. It is argued by the Respondent that the Applicant has not rented any premises either at **Mwalimu House** or **Kitui Bus Park** as they have not exhibited any lease agreement; but they have not claimed that the Sacco has leased the office or kiosk in contention. They have denied having any interest in the premises in issue as they have leased their own premises.

20. Further, they alleged that the original licence was issued to the Sacco but was fraudulently transferred to the Applicant an issue that will be determined in the substantive suit.

21. Following the contention aforesaid, the grievance raised by the Applicant may be genuine. The rights of the Applicant may be infringed if not protected prior to a proper explanation being given at the hearing of the substantive suit. In the premises I find the Applicants having established a *prima facie* case that requires an intervention by this Court.

22. The Applicant stated that they are in custody of documents that belong to third parties which may be lost if there is interference. Such an interference may lead to irreparable loss. Looking at the balance of convenience, it tilts in favour of the Applicant, if indeed the premises the Applicant occupy is interfered with.

23. In the result I order thus:

(i) A restraining order be and is hereby issued against the Respondents prohibiting them by themselves, their agents and/or servants from closing the offices of the Applicant situated at **Mwalimu House, Kitui** and a kiosk at the Bus Park/Stage or taking over or interfering with its business pending hearing and determination of the suit.

(ii) Costs of the application shall be in the cause.

24. It is so ordered.

**Dated, Signed and Delivered at Kitui this 12<sup>th</sup> day of June, 2018.**

**L. N. MUTENDE**

**JUDGE**