



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL SUIT NO. 194 OF 2017**

**JIHAN ABASS..... PLAINTIFF/APPLICANT**

**- V E R S U S -**

**THOMAS KIMEMIA KABERI .....DEFENDANT/RESPONDENT**

**RULING**

1. The subject matter of this ruling is the motion dated 18.9.2017 taken out by Jihan Abass, the plaintiff herein. In the aforesaid motion the plaintiff sought for the following orders:

- i. THAT this application be certified as urgent and service thereof dispensed with and the same be heard ex-parte in the first instance.**
- ii. THAT the honourable court be pleased to issue an order restraining the defendant/respondent from passing off the application as his, selling the application, disclosing contents of the application, advertising the application or in any way acting in a manner prejudicial to the plaintiff/ applicant pending hearing and determination of this application.**
- iii. THAT the honourable court be pleased to issue an order compelling the defendant/respondent to disclose the extent of disclosure already made to third parties pending hearing and determination of this application.**
- iv. THAT the honourable court be pleased to issue an order restraining the defendant/respondent from passing off the application as his, selling the application, disclosing contents of the application, advertising the application or in any way acting in a manner prejudicial to the plaintiff/ applicant pending hearing and determination of the suit.**
- v. THAT the honourable court be pleased to issue an order compelling the defendant/respondent to disclose the extent of disclosure already made to third parties pending hearing and determination of the suit.**
- vi. THAT this honourable court be pleased to make any other or further orders as it deems fit and in the interest of justice.**
- vii. THAT costs of this application be in the cause.**

2. The motion is supported by the affidavit of the plaintiff. When served with the aforesaid motion, Thomas Kimemia Kaberi, the defendant herein, filed a replying affidavit he swore to oppose the application.

3. When the motion came up for interpartes hearing, learned counsels appearing in the matter recorded a consent order to have the motion disposed of by written submissions.

4. I have considered the grounds stated on the face of the motion plus the facts deponed in the affidavits filed in support or against the motion. I have further considered the written submissions filed by the respondent. It is the submission of the plaintiff/ applicant that on 8/9/2017 she called for a meeting to discuss a new Insurance business venture in form of an application. In that meeting the plaintiff stated that she cautioned all participants who were in attendance that the information she was going to reveal was confidential and she required all of them to sign a non-disclosure agreement thereafter. The plaintiff then proceeded to disclose the contents of the application.

5. It is the submission of the plaintiff that though the defendant was in attendance of the meeting he refused to sign the non-disclosure agreement claiming that some of the clauses in the said agreement needed to be varied and as such he would require time to discuss with his counsel before signing.

6. The plaintiff also stated that the defendant thereafter refused to execute the non-disclosure agreement but instead the defendant sent to the plaintiff a totally new agreement which was prejudicial to the plaintiff. For the above reasons the plaintiff urged this court to grant the orders sought.

7. The defendant/respondent vehemently opposed the motion arguing that the plaintiff had failed to demonstrate that she had a registered application and or intellectual property right capable of being protected by this court. It was also pointed out that the plaintiff has not even stated the name of her application or the intellectual property rights that she seeks to be protected. It is further the defendant's argument that the application to have him compelled to disclose the information he has disclosed to third parties is tantamount to the plaintiff engaging in a fishing expedition.

8. The principles to be considered in an application for injunction are well settled. It suffices to cite the case of **Giella vs= Cassman Brown & Co. Ltd (1972) E.A 358** in which it was held *inter alia* that an applicant must show that it has a prima facie case with a probability of success. Secondly, that an applicant must show that if the order for injunction is denied it would suffer irreparable loss. Thirdly that where the court is in doubt, it would decide the application on a balance of convenience.

9. I have already enumerated the grounds the applicant has put forward in support of her application for injunction. The question which must be answered at the beginning is whether the applicant has shown that she has a prima facie case with a probability of success. The applicant has stated that she held a meeting attended by the defendant. She claimed she gave those participants a non-disclosure agreement to sign binding them not to disclose confidential information she was going to share with them. It is said that the defendant was the only party who failed to sign the non-disclosure agreement. It is said he went ahead to vary the contents of the form the plaintiff gave.

10. The defendant in his replying affidavit stated that he was not aware of the details of the conversation with the plaintiff would entail other than to help her develop an execution plan for insurance business.

11. What is apparent is that the defendant admits he attended the plaintiff's meeting where participants shared some vital information on how to develop an application to be used in insurance business. The defendant appears to suggest that it is the plaintiff who sought for advice from the defendant in his capacity as an insurance business consultant on how to develop an application/program to be used in insurance business.

12. The defendant further admits that he was given a copy of a non-disclosure agreement which he said that he failed to execute because the same was lopsided.

13. He said that after consulting his advocate he sent the plaintiff a draft agreement which is mutually obligatory.

14. After a careful analysis of the arguments of both sides, I am convinced that the plaintiff has shown she has a prima facie case with high chances of success. Though she did not disclose the nature of business application/program which she shared with the participants who included the defendant, it is apparent from the annexures attached to the affidavits filed in support and against the motion that the information shared appeared confidential and of the nature of intellectual property which needs protection.

15. Having come to the conclusion that the plaintiff has shown that she has a prima facie case with high chances of success, the next issue is whether the plaintiff has shown that she would suffer irreparable loss if the order for injunction is not granted. It is the submission of the defendant that the plaintiff has not shown the irreparable loss she would suffer if the order for injunction is denied. I have already noted that the plaintiff shared confidential information with the participants who attended the meeting held on 8/9/2017 after which participants were required to sign non-disclosure agreement prepared by the plaintiff to protect her business application. It would appear the non-disclosure agreement was meant to forestall any attempt by the participants from using or disclosing the plaintiff's business application/ program as an intellectual property.

16. I am convinced that if the order for injunction to restrain the defendant is not granted, the plaintiff would suffer irreparable loss in that her business application/program will have been disclosed by the defendant who has blatantly refused to sign the non-disclosure agreement he collected from the plaintiff after getting vital information from the plaintiff to bind him from disclosing or using the plaintiff's intellectual property which is yet to be registered.

17. The plaintiff/applicant has also sought for an order of mandatory injunction to compel the defendant to disclose the extent of disclosure already made to third parties of the plaintiff's application. With respect, I agree with the submissions of the defendant that the prayer is tantamount to asking him to incriminate himself.

18. I also agree with the defendant that in making the prayer for mandatory injunction, the plaintiff is basically engaging herself in a fishing expedition which is not permissible in law. Consequently, I decline to grant the request for mandatory injunction.

19. However the prayer for a prohibitory order of injunction is given. Consequently the motion dated 18.9.2017 is allowed in terms of prayer 4 with costs abiding the outcome of this suit.

**Dated, Signed and Delivered in open court this 9<sup>th</sup> day of November, 2018.**

**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Plaintiff

..... for the Defendants