



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**COMMERCIAL & TAX DIVISION**  
**CIVIL SUIT NO. 387 OF 2016**

**BRIAN MUTHEE MWANGI.....PLAINTIFF**

**-VERSUS-**

**JUBIZA INVESTMENTS LIMITED.....DEFENDANT**

**RULING**

**[1]** By a Plaint dated and filed herein on **23 September 2016**, **Brian Muthee Mwangi**, the Plaintiff herein, sued the Defendant, **Jubiza Investments Limited**, seeking judgment in the following respects:

[a] That the Court be pleased to issue an order compelling the Defendant to comply to and or enforce the provisions of the Defendant's Constitution in particular Article III Section 7 of the said Constitution and pay the Plaintiff his accrued dues;

[b] Interest on [a] above at Court rates from the day the amount fell due;

[c] That an order be issued compelling the Defendant to furnish the Plaintiff with the following documents:

[i] Annual Returns for the past three years;

[ii] Tax Compliance Certificate;

[iii] Statement of Accounts;

[iv] A copy of the Memorandum and Articles of Association;

[vi] The Shareholders Agreement;

[d] That the Defendant do deposit Kshs. 900,000 with the Court pending the determination of this suit;

[e] That in the alternative to prayer [d] above, the Court be pleased to order a halt on any dealings with the properties registered to Jubiza Investments Limited and a complete freeze of the Defendant's bank accounts pending the hearing and determination of the suit;

[f] Costs of the suit;

[g] Any other relief or order that the Court may deem fit to grant.

**[2]** Along with the Plaintiff aforementioned, the Plaintiff filed the Notice of Motion dated **23 September 2016** (the first application) pursuant to **Sections 143, 146-149, 157 and 158** of the **Companies Act, Section 1A, 1B, 3A of the Civil Procedure Act and Order 51 of the Civil Procedure Rules, 2010** for interim orders that:

[a] spent

[b] the Defendant do supply, furnish and/or issue the Plaintiff with the following documents:

[i] Annual Returns for the past three years;

[ii] Tax Compliance Certificate;

[iii] Statement of Accounts;

[iv] A copy of the Certificate of Incorporation;

[v] A copy of the Memorandum and Articles of Association;

[vi] The Shareholders Agreement;

[c] the Defendant do deposit **Kshs. 900,000** in Court pending the hearing and determination of the suit;

[d] That in the alternative to Prayer 3 above, the Court be pleased to order a halt on any dealings with the properties registered in the name of Jubiza Investments Limited and a complete freeze of the Defendant's bank accounts pending the hearing and determination of this suit;

[e] That the costs of the application be provided for.

**[3]** The application was supported by the Plaintiff's affidavit attached thereto, sworn on **23 September 2016**, in which the Plaintiff expounded on the grounds set out on the face of the Notice of Motion, and averred that on or about the year **2013**, he and some of his colleagues came together and agreed to form an investment group. To that end, a special purpose vehicle was incorporated in the form of **Jubiza Investment Limited** (the Company), whose operations would be funded by shareholders' individual monthly contributions of **Kshs. 30,000**.

**[4]** The Plaintiff further deposed that he paid his monthly subscriptions diligently and participated in the meetings and activities of the Company until **4 April 2016**, when he decided to resign from his membership and position as Vice Chairman due to some unforeseen circumstances by the shareholders. He added that he expected the Chairman to adhere to the terms of the Constitution agreed on by the group of friends and pay him his contributions; but that the Chairman declined to do so and instead asked him to reconsider his decision. In a letter dated marked "**BMM4**", the Defendant informed him that after the calculations had been done, he would be required to pay the Company instead. Hence, granted the impasse, he opted to move to Court for a resolution of the dispute and for interim relief. As exhibits in support of his application and in addition to "**BMM4**" aforementioned, the Plaintiff attached to his affidavit a letter from the Registrar of Companies giving the names of the Defendant's shareholders ("**BMM1**"); the Constitution of the Defendant ("**BMM2**"); a copy of his resignation letter ("**BMM3**"); copies of letters written by the Plaintiff to the Defendant, its Advocates and fellow shareholders on the matter of his resignation and dues; and a copy of the letter by the Plaintiff's Advocate requesting for the documents that are the subject of this suit.

[5] In response to the Plaintiff's application, an affidavit was filed herein, sworn by the Chairman and Director, **Victor Kirui**, on **13 October 2016**. He confirmed that the Defendant was incorporated in the year 2013 and that it carries on different kinds of business in the furtherance of the objectives of the Company and its shareholders as envisaged in its Memorandum and Articles of Association. It was further confirmed that on **5 April 2016**, the Plaintiff wrote to the Defendant conveying his decision to resign as a director and shareholder of the Defendant; and that the directors of the Defendant thereafter met and a response was prepared approving the resignation.

[6] It was further the contention of the Defendant that, as a director, the Plaintiff had access to all the documents he is now seeking; and that no details had been provided to support the **Kshs. 900,000** that the Plaintiff seeks to be paid. According to the Defendant, the Plaintiff cannot purport that his shares are worth **Kshs. 900,000** without placing before the Court evidence to demonstrate the same, or taking into account the liabilities of the Company. It was therefore urged that the Plaintiff's application be dismissed with costs in the interests of justice and all the shareholders, including the Plaintiff.

[7] The record shows that when the application came up for disposal on **23 September 2016** under a Certificate of Urgency, the Court gave directions that it be served for hearing *inter partes* on **28 September 2016**; on which date there was no appearance for the Defendant in spite of due service. Accordingly, a *status quo* order was issued in respect of the Defendant's bank accounts, which had the effect of freezing the accounts, pending the hearing and determination of the application *inter partes*. Aggrieved by the status quo order, the Defendant filed the Notice of Motion dated **29 September 2016** (the second application) under a Certificate of Urgency. The parties' respective concerns were resolved by a negotiated order that a sum of **Kshs. 900,000** which the Plaintiff claims as his contributions up to the time of his resignation in **April 2016**, be deposited in a joint interest earning bank account in the names of Counsel on record. Thereupon, the *status quo* order was lifted. The parties thereafter filed their respective written submissions in respect of the two applications for the Court's consideration. This Ruling is therefore in respect of the two applications aforementioned.

[8] There is no dispute that the Plaintiff has been a shareholder and Vice Chairman of the Defendant; or that he opted to tender his resignation on **5 April 2016** vide the letter marked **BMM 4** annexed to the Plaintiff's affidavit. Whereas the Defendant did not oppose the decision by the Plaintiff to resign from the Company, it pointed out the correct procedure for such resignation as set out in the Articles of Association of the Defendant, as opposed to the Constitution, which was superseded by virtue of the incorporation of the Defendant. Thus, by the time this suit was instituted, the Defendant's posturing was that the Plaintiff was still a shareholder, notwithstanding his resignation as a director of the Defendant.

[9] Granted that the parties have resolved the twin issues relative to the deposit of the **Kshs. 900,000** in dispute and the lifting of the freeze order, pending the hearing and determination of this suit as prayed in the first application, the only outstanding issue is prayer [b], namely: that the Defendant do supply, furnish and/or issue the Plaintiff with the following documents:

- [i] Annual Returns for the past three years;
- [ii] Tax Compliance Certificate;
- [iii] Statement of Accounts;
- [iv] A copy of the Certificate of Incorporation;
- [v] A copy of the Memorandum and Articles of Association;
- [vi] The Shareholders Agreement;

[10] Needless to say that this prayer is also one of the substantive prayers in the Plaintiff, and therefore ought to be granted only after a hearing on the merits. Moreover, Prayer [b] aforementioned is also in the nature of a mandatory injunction, which is only available at the interlocutory stage in special

circumstances, a point well explicated by the Court of Appeal in **Kenya Breweries Limited vs Washington Okeyo [2002] 1 EA 109** thus:

**"A mandatory injunction can be granted on an interlocutory application as well as at the hearing but in the absence of special circumstances, it will not normally be granted...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 the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant had attempted to steal a march on the plaintiff. Moreover, before granting a mandatory injunction the Court had to feel a high degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction."**

**[11]** It is noteworthy however that even this prayer for documents was agreed on by Counsel and the Court notified thereof on **4 November**

**2016.** In the premises, I would find and hold that the application has been entirely compromised, save for costs; which ought to be in the cause in the circumstances.

**[12]** The second application, dated **29 September 2016** was filed by the Defendant pursuant to **Article 159 of the Constitution of Kenya, Sections 1A, 1B, 3A and 63(e) of the Civil Procedure Act, Chapter 21 of the Laws of Kenya, and Order 51 Rules 1 and 15 of the Civil Procedure Rules**, for the following orders:

**[a]** spent

**[b]** That pending the hearing and determination of the application *inter partes*, the Court be pleased to stay the enforcement of the Orders granted in favour of the Plaintiff on **28 September 2016**;

**[c]** That pending the hearing and determination of the application *inter partes*, the Court be pleased to set aside and/or discharge the Orders granted *ex parte* in favour of the Plaintiff on **28 September 2016**;

**[d]** That the Court be pleased to order that the Defendant and its duly authorized agents be allowed to access the said accounts;

**[e]** That the Court be pleased to make such further orders as are necessary for the ends of justice;

**[f]** That the costs of the application be borne by the Plaintiff.

**[13]**The application was hinged on the grounds that the Plaintiff's advocate fabricated lies and misled the Court into believing that the Defendant was being wound up without having any tangible evidence on the same; and that by virtue of those precipitate orders, the operations of the Defendant had been adversely affected, hence the need for the setting aside thereof. The application was supported by the affidavit of **Victor Kirui** annexed thereto. From the prayers set out herein above, it is evident that even this application was compromised by the orders for depositing **Kshs. 900,000** in a joint interest earning account in the names of Counsel for the parties herein; for that order was conditional on the freeze order that is the target of the second application being lifted, and access to the Defendant's bank account being provided to its authorized agents. In the premises, the orders that commend themselves to the Court in respect of the two applications herein are as follows:

**[a]** That the **Kshs. 900,000** that was deposited in an escrow account in the joint names of the Advocates on record for the parties herein, be so maintained pending the hearing and final

**determination of this suit;**

**[b] For the avoidance of doubt, the Plaintiff be provided with the documents set out in Prayer (2) of the Notice of Motion dated 23 September, 2016;**

**[c] The costs of the two applications be in the cause.**

Orders accordingly.

**DATED AND SIGNED AT NAIROBI THIS 7<sup>TH</sup> DAY OF APRIL 2017**

**OLGA SEWE**

**JUDGE**

**DATED COUNTERSIGNED AND DELIVERED AT NAIROBI THIS 7<sup>TH</sup> DAY OF APRIL 2017**

**RACHEL NG'ETICH**

**JUDGE**