



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KIAMBU
CIVIL SUIT NO. 27 OF 2017

PETER MWANGI MWAURA..... PLAINTIFF/APPLICANT

VERSUS

GEOFFREY KAMAU WAWERU.....DEFENDANT/RESPONDENT

RULING

1. The Plaintiff took out a plaint dated 05/12/2016 seeking, in the main, dissolution of a partnership agreement he alleges exists between himself and the Defendant. Concomitantly, the Plaintiff seeks accounts of the partnership business known as

“Tulia Gardens” from the date of inception till dissolution and that the Plaintiff’s shares be rendered. He also seeks general damages.

2. Simultaneously with the Plaint, the Plaintiff took out a Notice of Motion of even date. It seeks six prayers as follows:

i. That the Application be heard ex parte in the first instance and be certified urgent.

ii. That, pending the hearing and determination of the suit or until further orders, a temporary injunction do issue prohibiting the Defendant from selling, transferring, subletting or in another manner disposing or offering to dispose of the partnership business, or any part thereof known as Tulia Gardens situate in Muthiga Kinoo.

iii. That pending the hearing and determination of this suit or until further orders, an order do issue compelling the Defendant to forthwith render to the Plaintiff true accounts and full information of all things affecting the partnership business known as Tulia Gardens situate at Muthiga, Kinoo.

iv. That the Defendant be compelled to grant the Plaintiff access to the partnership books, the place of business and the day to day management of the firm pending the hearing and determination of this suit.

v. That the Defendant do open a joint account with the Plaintiff into which all the sale proceeds and income of the firm shall be deposited pending the hearing and determination of the suit.

vi. Any other relief as may be deemed just and expedient in the circumstances of the case.

3. The Plaintiff’s case is straightforward. He says he had long desired to own a bar/restaurant business and that in early 2016, he came across premises at Muthiga which appealed to him. However, he was short of funds to start the business on his own so he approached the Defendant to interest him in a

partnership. The Plaintiff claims that the Defendant was enthusiastic about the idea – and they visited the premises at which point they orally agreed to start a partnership with the understanding that the terms of the partnership will be reduced into writing at a later date.

4. Consequently, the Plaintiff and the Defendant – on the one hand – and the owner of the premises – on the other – signed a lease agreement for the premises. Each of the Plaintiff and Defendant paid Kshs. 100,000 towards the security deposit and the rent for the first two months for the premises. The Plaintiff has exhibited a copy of the signed lease agreement and the cheques he used to pay for the Kshs. 100,000. He has also exhibited a receipt for his portion of the legal fees for the Lease Agreement.

5. Pursuant to the oral agreement, the Plaintiff says that he plunged into the business head on – investing a total of Kshs. 3,127,569 in the next few weeks in readiness for the business. These amounts were spent on remodelling of the premises, purchases of various supplies and furniture for the new business including chairs, Television sets, installation of CCTV and Point of Sale, and various services including security, water and entertainment. The Plaintiff has particularized all the expenditures in his witness statement.

6. The Plaintiff says that the business finally opened its doors on 02/09/2016. By then, however, there were already signs that the honey moon period between the Plaintiff and the Defendant was over. By the Plaintiff's rendering, the Defendant had become evasive about signing the partnership agreement agreed to earlier and had also become evasive about tabulating the extent of his capital expenditures on the business. Finally, he had become evasive about opening an account for the business.

7. Things came to a head barely two weeks after the opening of the business when the Plaintiff claims the Defendant made extensive changes in the workforce without consultation and installed his "own people" to man key positions like the bar counter, supervisor and accountant. The Plaintiff also claims that he discouraged staff from using the computerised point of sale system ostensibly to escape accountability. He also, the Plaintiff claims, instructed staff to deposit all sale proceeds in his own account.

8. To cut a long story short, the end result was that the Plaintiff was locked out of the business. He now fears that the Defendant wants to sell the business posing as a sole owner and hence denying the Plaintiff both the capital expenditure he invested in the business as well as the profits from the partnership which were accumulated during the pendency of the partnership.

9. The Plaintiff acknowledges that the partnership is no longer viable and seeks its dissolution, a rendering of accurate accounts to enable partition as well as his shares as above. He also seeks damages for breach of the partnership agreement.

10. On his part, the Defendant denies that he has ever entered into any partnership agreement – whether oral or written with the Plaintiff. His position is that there are two businesses operating on the parcel of land known as Dagoretti/Kinoo/2482: "Tulia Gardens" which he says belongs to the Plaintiff and "Petals and Laces" of which the Defendant is the sole proprietor.

11. The Defendant says that the premises are informally divided into three: the grounds, the backyard and the middle portion. His business occupies the middle portion while the Plaintiff's business occupies the grounds and the backyard.

The Defendant says he has a lease for his portion – which he has exhibited in his Replying Affidavit. The Plaintiff's response to this is that the Defendant colluded with the Landlady to sign another lease after they had executed the one for Tulia Gardens which the Plaintiff exhibited in his affidavit.

12. The Defendant admits that he executed a joint lease with the Plaintiff but says that this was when they were considering a joint venture but that that idea never materialized and each person ended up doing their business.

13. The Defendant is resolute that he paid for all the works, services and furniture for his business premises. He says that it is laughable that the Plaintiff claims he purchased goods for the business. He

mocks some of the receipts exhibited – especially the ones for the purchase of the TV sets – saying that they are inauthentic as they do not contain any serial numbers. However, he does not exhibit any receipts to demonstrate that he purchased the TV sets or any of the furniture himself.

14. It is important to recall that the procedural posture of the Application: it is an application for interlocutory reliefs. Hence, by definition, I cannot come to anything more than provisional conclusions on the merits of the case or even disputed legal positions. The main purpose of a preliminary injunction is to protect the plaintiff from irreparable injury and to preserve the power of the Court to ultimately render a meaningful decision on the merits. The Court must be careful, in considering applications for preliminary injunctions, not to determine any disputed right. The aim is to prevent a threatened wrong or the doing, by one of the parties to a litigation, an act which might threaten or endanger the rights of the plaintiff.

15. In our jurisprudence, this legal position is now enshrined in a tripartite legal criterion for granting interlocutory injunctions. This criterion, setting out the legal principles for granting interlocutory injunctions, is set out in the celebrated case of *Giella vs Cassman Brown* in the words of Spry V.P.:

First, an applicant must show a *prima facie* case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not be adequately compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.

16. Hence, the Court's first task is to determine if the Plaintiff has established a *prima facie* case with a probability of success once the full case is ventilated. In my view, the Plaintiff has satisfied this first *Giella* factor. In reaching this conclusion, I must be careful to reiterate that I do not mean to suggest that there is certainty that the Plaintiff will succeed on the merits; only that he raises an arguable case with a probability of success (see, for example, *Mrao Ltd v First American Bank of Kenya Ltd & 2 others [2003] KLR 125*). I have come to this conclusion based on the facts presented by the Plaintiff and weighing them tentatively against the account provided by the Defendant. In particular, I have been persuaded that the jointly-executed lease agreement and the various receipts for works, services and goods exhibited by the Plaintiff raise a *prima facie* case that there is a possibility that the partnership agreement the Plaintiff claims existed did, in fact, exist. I have contradistinguished these detailed receipts with lack of any receipts or details in the Defendant's account.

I note that ultimately oral evidence will be crucial to make a determination whether, in fact, the partnership agreement existed or not.

17. I also easily find that the Plaintiff has met the second *Giella* factor. It would be impossible to ever know what the sales or capital expenditures were if the Defendant sells the property or fundamentally changes it any way. For the same reason, the third *Giella* factor is in favour of the Plaintiff.

18. For these reasons, I will acquiesce to the second prayer by the Plaintiff.

19. I am, however, uncertain about Prayers (4) and (5) in the Notice of Motion. The Plaintiff admits that he has already been locked out of the business. His final prayer is for dissolution. I am not sure much would be achieved by ordering the Plaintiff to have access to the partnership books, the place of business and the day to day management except for a brief period only aimed at discovering information that would aid him in prosecuting his case. It would be improper, in my view, at this stage to direct that the Plaintiff may indefinitely have access to an ongoing business which he has already been locked out even by his own rendering. Similarly, it would be improper to order the parties to open and operate a joint account for the business at this time. It would seem to me that if the Plaintiff eventually succeeds in his suit, an order for accounting will take care of his anxieties about the proceeds for sale.

20. As for prayer (3), I would respectfully agree with the Defendant's counsel that it is in the nature of a mandatory injunction which is inapposite at this juncture in the proceedings. That prayer would have to await a definitive finding that a partnership existed.

21. Hence, I will, instead make the following orders:

i. First, pending the hearing and determination of the suit or until further orders, an interlocutory injunction shall issue prohibiting the Defendant from selling, transferring, subletting or in any other manner disposing or offering to dispose of the partnership business, or any part thereof known as Tulia Gardens situate at Muthiga, Kinoo.

ii. That within thirty days of today, the advocates of the two parties do agree on a date when the Plaintiff and/or his agents will access the place of business and inspect any goods, books, records and the running of the business for purposes of collecting information to prosecute their case. The two parties' advocates are directed to plan the visit so that it is as least intrusive as possible. To ensure the smooth operation of the visit, the parties may incorporate and provide for the Executive Officer, Kiambu Law Courts to be present to record the proceedings and make a report to the Court.

iii. The parties shall move with speed to perfect this case for hearing. To this extent, the matter shall be listed before the Deputy Registrar within the next forty five (45) days for further directions.

22. Orders accordingly.

Dated and delivered at Kiambu this 15th day of June, 2017.

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JOEL NGUGI

JUDGE