REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL CASE NO 28 OF 2015

STEPHEN KIRIMI RINGERA …….....PLAINTIFF

VERSUS

DAVID MWIRARIA …….... 1ST DEFENDANT

NJURI MOTORS LIMITED ……2ND DEFENDANT

STANLEY KUURA KITHAGACHA ….. 3RD DEFENDANT

RULING

Injunctionto restrain dismissal of CEO of Company

[1] I am considering the application dated 8th December, 2015 which is expressed to be brought under Order 40 rule 1 and 3 and Order 51 rule 1 of the Civil Procedure Rules. The outstanding relief inthat applicationis prayer no. 3 and 4. The significant Prayer is No 3 which seeks for injunction to restrain the 1st and 3rddefendants from:-

> (1) Preventing,expelling, suspending orinany other way interfering with the plaintiff's right of access and operations of Njuri Motors Ltd;
>
> (2) Enteringand or carrying out direct management of, appointing, employing and or delegating any personwhatsoever to be the Chief Executive Officer (CEO) in place of the applicant; and
>
> (3) Demolishing offices and or structures, moving equipment, machines and or parts thereof, carrying away the properties ortransactingupon bank accounts in Consolidated Bankand Commercial Bank ofAfrica,Meru Branch belonging to Njuri Motors Ltd.
>
> Prayer 4 is on provision for costs. The said application is grounded upon the affidavit of Stephen Kirimi Ringera.

[2] The Applicant alleges that he has heavily invested in the business known as Njuri Motors Ltd; that the defendants have prevented him from accessing and or participating in the operations of the 2nd defendant; and they have unlawfully and or un-procedurally replaced the plaintiff as a mandatory signatory of the company bank accounts. He stated that his appointment as the CEO of the company was as a result of a gentleman's agreement with the 1st and 3rd defendants to partner in the running of the company. Following his appointment he took over the running of the company to the exclusion of the 1st and 3rd defendants. The Company was founded by the three of them. He was categorical that his

expulsion from the company is greatly prejudicial to him because creditors have threatened to sue him in both civil and criminal cases yet those debts benefited the company. He sees himself as being reduced to being the sacrificial lamb while the other two benefit from their own mischief. And most of all, he willlose his investment and rights in the company if the two are allowed to exclude him from the management of the company. He cited the case of***Rosemary WanjikuKinyanjui –vs- Martin Wainaina High Court – Nairobi CC.NO. 1676 of 1995 (unreported)*** Ringera J (as he then was). The applicant argued that on the material on record he has demonstrated prima facie case with overwhelming chances of success because as a shareholder, director and CEO of the company, he has injected millions of shillings in the company which will be lost should the 1st and 3rd defendants be allowed to exclude him from the management of the company. He believed that this is a triable cause of action for which an injunction should issue. On the other requirement of irreparable damage occurring, the applicant stated that the damage that may ensure to him in the event the defendants succeed intheir manoeuvres will be irreparable one; not compensable by an award of damages. He also argued that the 1st and 3rd defendant did not confirm under oath that they have financial muscles to buy him off. And given all the above, the applicant is convinced that the balance of convenience, tilts in favour of granting of an injunction. According to the applicant all requirements in Giella vs Cassman Brown [1973] EA have been met. In addition he beseeched court to invoke Section 1A and 1B of the Civil Procedure Act on overriding objective and resolve this application in his favour. They also cited the case of D.T. Dobie Ltd. The Applicant rounded up his submissions by stating that the respondents will not suffer any prejudice if the injunction is granted as such orders will only help to preserve the company's interest. He stated that the company herein has 8 directors including Smart Connections Ltd in which he is also a director and whose interest will also be prejudiced. He urged the court to grant an injunction under Order 40 of the Civil Procedure Rules.

Respondents: Injunction not merited

[3] The 3rd respondent filed a replying affidavit sworn on 18th January, 2016 in opposition to the application and accused the applicant as the CEO of the company since its inception, of poor management of the company such that the company lost dealership of Toyota Kenya in 2012, and had accumulated loss of Kshs. 5,319,135, and 7,048,840 from 2011 to 2012 and 2013 to 2014 respectively. He also accused him of engaging in politics to become MP for BuuriConstituency. He averred that these facts have not been controverted or disputed by the applicant. Given these facts, the respondent concluded that the applicant has not established a prima facie case with highchances of success in the sense of the case of **MRAO LTD vs. FIRST AMERICAN BANK OF KENYA LTD AND 2 OTHERS,** and**GIELLA VS CASSMAN BROWN.**

[4] That is not all;the respondents accused the applicant of not disclosing that by the company resolution, the applicant was not given a second term as CEO. But he regretted that the said resolution was not available because the applicant did not hand over and disappeared with all company files which contained the resolution. In addition, the respondents submitted that CEO is a fiduciary position and he should not have misappropriated company funds, thus, forcing the 1st respondent to inject more capital into the company. He also accused the applicant of insubordination and failure to perform duties required of him. Despite warnings, the respondent said that the applicant continued with his illegal conduct and these events culminated to his removal as signatory to the company's accounts vide a resolution of the company passed on 8th August, 2015. He said that on 14th April 2010 the applicant had been invited to a management meeting to defend himself against the allegations above. This accorded with rules of natural justice. Therefore, according to the 1st respondent, all averments by the applicant are but falsehoods and half-truths. For that he considered him to be before court with unclean hands for which he should be denied the equitable remedy sought.

[5] The respondents also submitted that there is no irreparable damage that the applicant will suffer for he is a shareholder with definite shareholding. The capital he injected into the company was in accordance with the Memorandum and Articles of Association. Provision for Directors emoluments is also there and is a quantifiable matter should he succeed in his claims. Accordingly, respondent do not see how irreparable damage would arise in these circumstances. In sum, the respondents were of the view

that any balance of convenience, would not favour granting of an injunction. On that basis, the respondents urged thiscourt to dismiss the application for injunction.

DETERMINATION

[6] The application before me is one of interlocutory injunction. I do not, therefore, wish to re-invent the wheel as the legal prescriptions which guide granting of an interlocutory injunction are set out in this case of **Giella vs CassmanBrown.**Except, I am aware that, with the promulgation of the Constitution of Kenya, 2010 and the entry into our law of the principle of overriding objective, courts should take a much wider view of justice in applying such prescriptions of the law in order to serve substantive justice to the parties. This thinking is inline with the legal reality that injunctive relief is also dynamic like any other limb of the law and has kept on growing to greater levels of retirement to capture areas not previously foreseen. On this, see the wisdom in the words of Ojwang Ag J (as he then was) in the case of **SULEIMAN vs. AMBOSELI RESORT LTD (2004)e KLR 589**at page 607 that***:-***

> ***'…….counsel for the defendant urged that the shape of the law governing the grant of injunctive relief was long ago in Giella Vs Cassman Brown, in 1973 cast in stone and no new element may be added to that position. I am not, with respect, in agreement with counsel in that point, for the law as always kept growing to greater levels of refinement, as it expands to cover new situations not exactly foreseen before''.***

I should, therefore, ask myself whether in the circumstances of this case:

> ***(a) The applicant has established a prima facie case with high probabilityof success.***
>
> ***(b) Irreparable damage not compensable in an award of damages may result unless an injunction is issued; and or***
>
> ***(c) In case of doubt, where does balanceof convenience lie?***

On prima facie

[7] Prima facie case was defined in the case of**MRAO LTD vs. FIRST AMERICAN BANK OF KENYA LTD & 2 OTHERS CIVIL APPEAL NO. 39 OF 2002 (Court ofAppeal at Mombasa)** as follows:

> ***'A prima facie case in a civil application includes but isnot confined to a genuine and arguable case. It is a case which when presented to the court or a tribunal properly directing itself will conclude that there exists a right which had apparently been infringed by the opposite party hence the need to call for an explanation or rebuttal from the former."***

The applicant is a shareholder, a director and was CEO of this company. As CEO of the company he acted is the Managing Director appointed pursuant to Article 15 of the Memorandum and Articles of Association of the 2nd defendant company. Doubtless, such appointment may also be revoked by the directors of the company under the said article. From the quality and tone of the arguments by the Applicant, I am compelled to state this; within the governing instrument of this company, there is no such thing as a CEO for life or whose appointment cannot be revoked in accordance with the terms of the agreement of appointment and the Memorandum and Articles of Association of the company. That notwithstanding, I note with concern that the applicant did not annexdocuments or resolution toshow his appointment or the terms of his appointment as CEO of the company. He only referred to a gentleman's agreement entered into with the 1st and 3rddefendants through which he was appointed. It is a matter of law that a company operates through formal resolutions or decisions in special or general meetings or meeting of the Board of Directors of the company. These formal documents are necessary in a case such as this if a prima facie case is to be made out; the appointment will establish the terms and conditions of appointment which are said to have been violated, thus, infringing on the Applicant's right. None is provided here. But let me examine other matters in that genre so that my penultimate finding will be

properly grounded.

[8] The Applicant argued that he took over as CEO the management of the company to the exclusion of all the other directors. That averment in itself is problematic. Why does the applicant want to keep management of the company exclusively tohimself and at the exclusion of all the other directors? Is he saying that, as a single individual he constituted the boardof directors of the company? Keeping this in mind, on the basis of the material provided at this stage, the allegations by the Respondents of poor management of the affairs and business of the company by the Applicant are strong and are not controverted. Audited Accounts of the Company filed herein show deficits and losses during the tenure of the Applicant. Again it is not disputed that the dealership by Toyota Kenya Ltd was lost. I see letters from Toyota Kenya Ltd and. In anyevent, and I have said this already, the Applicant was in exclusive management/operations of the company and any unsatisfactory state that the company could be in would just fall on his doorsteps for him to explain. All these matters do not support the claims by the Applicant.

Of irreparable damage

[9] Would there be any irreparable damage upon the Applicant unless an injunction is issued? If I understood him well, the Applicant's fear is that he will lose the huge investment he has injected into the company unless he is restored to be the CEO of the company. I have already stated that the company could remove the CEO pursuant to article 15 of the Company's Memorandum and Articles of Association. In addition,I do not see any basis for the fear expressed by the Applicant for two reasons. First, the company is not insolvent or on the road to being wound up; even if that were the case, that would be a legal process with its own course and remedies. Second, any capital lawfully injected by a director or a shareholderto the company is the asset of the company unless it is duly borrowed as and clearly designated to be a debt to the company; but such debt would be recouped in accordance with the loan agreement. The Applicant has not even claimed he advanced or lawfully advanced a debt to the company; he has merely stated that he injected huge investment in the company. Again, the shareholders will recoup the benefits of their shareholding in a company through lawful mediums such as dividends or bonuses or equities or participation in profits declared by the company etc. The directors and CEO will also receive emoluments, salaries, benefits, commissions or a combination of two or more of the foregoing etc. in accordance with the terms of appointment and the Memorandum and Articles of Association. Once more, the Applicant is not claiming any unpaid dividends or bonuses or equities or participation in profits declared by the company or directors and CEO emoluments, salaries, benefits, commissions or a combination of two or more of the foregoing. Nonetheless, even if he made such claims, I remind myself that such is quantifiable claim on which no injunction would issue. Accordingly, fear of loss of investment as shareholder of the company has no foot on which to stand; it will not be a basis on which the court may intervene or prevent directors from exercising their power to fire a CEO and appoint another one in accordance with the agreement of appointment and the Memo and Articles of Association.But before I conclude on irreparable damage, I find the argument by the Applicant that he fears personal liability on the debts accrued during his tenure as CEO to be quite intriguing. My knowledge of the law tells me that, the mere fact that one is a director or the CEO or shareholder of a corporation does not, *ipsofacto*, make such director or the CEO or shareholder liable for the debts of the Company unless the circumstances are such that the corporate veil of the Company can be lifted. See awork of the court in the case of **POST BANK CREDIT LIMITED (IN LIQUIDATION) vs. NYAMANGU HOLDINGS LIMITED**on***:-***

> ***Lifting or piercing the corporate veil***
>
> ***''...The status of separate corporate personality of a company as a legal person in Salomon v Salomon is the greatest legal innovation in company law. Although artificial person and does not possess the body of natural person, a company is a juristic person; a legal person in law. It exists only in contemplation of law. Because of its artificial nature, a company acts through human persons, namely, the directors, officers, shareholders, and corporate managers, etc., for its management and day to day running. But these individuals represent the company and accordingly whatever they do within the scope of the ostensible or authority conferred upon them by the Memorandum and Articles of Association, in the name and on behalf of the***

company, they bind the company and not themselves. Thus, the Directors, Members or shareholders of a limited liability company are not liable for the debts or liabilities of the company; the company is. Once the shareholders have contributed and paid up the nominal value of their shares, they are no longer liable to contribute anything further. However, it is quite different for companies which are formed with unlimited liability of members, or with members' guarantee to a particular amount.

I must admit, therefore, that such argument as have been posed by the Applicant would be suicidal especially if they mean that the concerned director or CEO took personal debts at the instance of the company or for which he anticipated he would be held personally liable.Of course if he lawfully guaranteed the company, he would be called up to make good the guarantee. But, such guarantee would be discharged in accordance with the terms of the guarantee and may not be a basis for stopping the company from firing a CEO. The above would be tragic if he followed that path and would work against him.Accordingly, I do not think any irreparable loss would occur unless an injunction is issued.

Balance of convenience

[10] I am aware this is interlocutory stage of this suit. But, the audited accounts for 204 to 2012 when the Applicant was the CEO show losses of Kshs. 5,319,125. The losses drastically reduced after this applicant's exit. When I consider allthese matters, there is absolutely nothing which would impel the court to hold that the Applicant should be the only person who can be the CEO of the company or the guaranteetowards preservation of the company. I have found that the argument by the applicant that if he is removed he will lose his vast investment does not hold sway; the company is still afoot and he has not shown any mismanagement on the part of the current CEO of the company affairs.Such mismanagement would also have been useful in a derivative suit for the benefit of the company, but after he has shown that he raised the matter with the Board of Directors or at a special meeting or general meeting of the company but in vain; or it was futile to have attempted to do so given the position taken by the majority or the offending directors. I am glad this is not a derivative suit. The Applicant did notalso come to court of equity with clean hands;he has not made full and frank disclosures on some pertinent issues on the losses made by the company during his tenure, the alleged resolution which did not extend his tenure as CEO, loss of the Toyota dealership etc., and so, equity will rollback its hands and says no to his request for equitable relief of interlocutory injunction. When these matters are weighed on scale, the convenience of the law lies in refusing the injunction request. On that basis, I dismiss the application dated 8th December 2015 with costs to the respondents. It is so ordered.

Dated,signed and delivered in open court at Meru this 15th day of September, 2016.

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F. GIKONYO

JUDGE

In the presence of:

Mr. Kariuki advocate for Ndubi advocate for plaintiff/applicant

Mr.Mutegi advocate for defendant/respondent

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F. GIKONYO

JUDGE