



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO 521 OF 2012

PAMELA NYAMUSI OBERI.....PLAINTIFF

Versus

GILBERT NYASAGARE NDEEGE.....1ST DEFENDANT

GILBERX ELECTRO SERVICES LIMITED.....2ND DEFENDANT

RULING

Application for injunction

[1] The Applicant has applied by way of Notice of Motion dated 14.8.2012 for an injunction to restrain the Defendants by themselves, their agents and or servants from interfering with the funds held in the 2nd Defendant's account with **COOPERATIVE BANK LTD KIMATHI STREET BRANCH A/C NO [particulars withheld]** pending hearing and determination of the suit. A temporary injunction restraining the Defendants by themselves, their agents and or servants from interfering with the funds held in the 2nd Defendant's account with **COOPERATIVE BANK LTD KIMATHI STREET BRANCH A/C NO [particulars withheld]** pending inter partes hearing of this application was issued on 15.8.2012 and has remained in force by virtue of extension by court between and in the presence of the parties.

[2] The application is supported by the applicant's affidavit which reveals the following grounds;

- a) That she is a director in the 2nd defendant company and had been in active management of the company until 2010 when she was side-lined by the 1st defendant in the running of the company.
- b) That she and the 1st defendant are joint signatories in **A/C NO [particulars withheld]** at **COOPERATIVE BANK LTD KIMATHI STREET BRANCH** held for and on behalf of the 2nd defendant.
- c) That the 1st defendant has been withdrawing money from the said account without the consent of the applicant.
- d) That the 1st defendant has even obtained a loan on behalf of the 2nd defendant company and has placed their matrimonial home as security for the said loan without the consent of the applicant.

- e) That the 1st defendant has threatened to sell the property of 2nd defendant consisting in 10 motor vehicles.

[3] The applicant in her submissions amplified the above grounds and alleged that she has been kept away from the management of the 2nd defendant by the 1st defendant through physical assaulted and intimidation. That when she was still in active management of the company, they used to jointly sign any cheques issued upon the company's account; closed or for cash withdrawals. She alleged that the 1st defendant has forged her signature in the annexed documents for overdraft facility of Kshs. 3,000,000. She has not also received any dividends on her shares in the company. By this exclusion from the management of the company, the physical abuse she has suffered, failure to receive any dividend from the company has caused her and the fact that the 1st defendant is engaging in theft of company's property translates into irreparable damage to her. She submitted that the threshold for the grant of temporary injunction set out in law has been met. She has established a prima facie case with a probability of success. She relied on three authorities which basically re-stated the principles in the case of **GIELLA v CASSMAN BROWN**.

The 1st defendant opposed the application

[4] The 1st defendant filed a replying affidavit and written submissions in which he opposed the application. He averred that the applicant has never been in active management of the 2nd defendant company at any time since incorporation of the said company. It is, therefore, wrong and impossible for her to suggest she has been side-lined by him. He also denies that he obtained any overdraft facility as alleged. What was obtained is a loan of Kshs. 10,000,000 upon a resolution of the company which even the applicant executed. She confirmed this in her further affidavit. He also denied the allegation on intended sale of company motor vehicles and deposed that the applicant has not provided any proof to support the claim. He further stated that some of the listed motor vehicles belong to him in person and not the company. He, however, confirmed that the company vehicles are engaged in company business. He concluded by stating that the court should not vary the operation of joint account for the applicant has never been involved in the management of the company. Accordingly, the applicant has not satisfied the threshold in law as set out in **GIELLA v CASSMAN BROWN** and should be denied the orders.

COURT'S RENDITION

[5] This is a case for a temporary injunction. The legal dimensions which should guide the court in determining whether or not to grant a temporary injunction were set out in **GIELLA V CASMAN BROWN & CO LTD (1973) EA 358**. These guiding principles are that:-

- a) ***The applicant must show a prima facie case with a probability of success;***
- b) ***An injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury; and***
- c) ***When the court is in doubt, it will decide the application on the balance of convenience.***

[6] I have considered the submissions of the parties. Doubtless, the applicant is a director of the 2nd defendant company and has not been disqualified or removed from directorship pursuant to the Articles of Association or law. They are the only two directors of the defendant company. Under the Articles of Association of the company, the business of the company shall be managed by the directors except the directors may from time to time appoint one or more of their body to the office of Managing Director, and may entrust to or confer upon the Managing Director any of the powers exercisable by them. The applicant submitted that they both used to run the business of the company prior to 2010 when she was forcefully excluded from the management of the company. The 1st defendant on the other hand asserted that she has never been involved in active management of the company; he was running it alone. Unless the 1st defendant was appointed as the Managing Director of the company under article 15 of the Article of Association and exercised powers donated to him by the Directors under articles 16 and 17 of the

Articles of Association, his “one-man-show” operation of the company renders credence that the applicant has a genuine grievance. He claims of isolation find legal support in that arrangement by the 1st defendant. The 1st defendant has admitted that he has always conducted the business of the company alone; which I have found to be contrary to the law. Therefore, the fear expressed by the applicant that her exclusion from the management of the company has affected her irreparably is well grounded in law. She has never been paid any dividend; which should ordinarily be declared by the company in annual general meeting. That adds another twist to the case; nothing shows that the 1st defendant acted in accordance with the law to ensure accountability by the company to the applicant as a shareholder. Such running of a company in contravention of her Articles of Association and the law is a practice which the law does not countenance. See the case of **ADC v NATHANIEL TUM & ANOTHER NBI HCCC NO 525 OF 2013** where the court in reference to a company which operated without accountability to its shareholders had the following to say:

“As a matter of great emphasis, that kind of operation by KSC was in contravention of the law and would entitle any member to seek redress in court; and such suit would certainly be considered within the exceptions to the rule in FOSS v HARBOTTLE (1843) 67 ER 189. But the court is mindful that KSC is a public company, which inclines the court to preserve the public property and investment in the company”.

The argument by the 1st defendant that a company is distinct entity from those who compose it is quite true; but it is the very legal reason why the law established that a company as a legal person must operate through its duly appointed human agents; the board of directors or as provided for under its Articles of Association. And it must adhere to the law.

[7] In sum, the applicant has established a prima facie case with a probability of success; she has shown she will suffer irreparable damage if the offending state of affairs is not removed, and should I engage the balance of convenience, it certainly tilts in favour of the applicant-for the 1st defendant should not benefit from his own default. Accordingly, I issue an injunction restraining the 1st Defendant by himself, their agents and or servants from interfering with the 2nd defendant’s account or with the funds held in the 2nd Defendant’s account with **COOPERATIVE BANK LTD KIMATHI STREET BRANCH A/C NO [particulars withheld]** except as shall be authorized by resolution of the company or by order of both directors until the hearing and determination of the suit. To avoid causing a halt to the operations of the company, I suspend the injunction for 30 days in order to allow the company to hold a company’s meeting and pass the relevant resolution with regard to the running of the account subject of this case. Other innocent third parties involved with the 2nd defendant will also not be exposed to any prejudice.

Dated, signed and delivered in open court at Nairobi this 4th day of March, 2014

F. GIKONYO

JUDGE