



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

**COMMERCIAL & ADMIRALTY DIVISION**

**MISC. APPLICATION NO. 162 of 2014**

**JOWAN INVESTMENT LIMITED :::::::::::::::::::: 1ST APPLICANT**

**WINFRED WANJA MBOGO :::::::::::::::::::: 2ND APPLICANT**

**SOSPETER ONUNDA OWAGA :::::::::::::::::::: 3RD APPLICANT**

**VERSUS**

**ADO BRO COMPANY LIMITED :::::::::::::::::::: 1ST RESPONDENT**

**HUSSEIN HASSAN ADO :::::::::::::::::::: 2ND RESPONDENT**

**EQUITY BANK OF KENYA :::::::::::::::::::: INTERESTED PARTY**

**RULING**

1. The application before the court is an Amended Originating Notice of Motion dated 22nd April 2014 and filed under the Judicature Act (High Court Vacation Rules, the Constitution, Sections 3, 3A, 63 (c), (e), 89, 92 (c) of the Civil Procedure Rules and Order 40 Rules 1, 2, 3 and Order 1 Rule 8, Order 37 Rule (11), Order 26 Rule 1, 2 and 5 and all other enabling provisions of the law.
2. The application seeks the following surviving orders:-

***2(a) That the Honourable Court be pleased to issue an order of injunction restraining the Respondents either by themselves, servants or agents or whomsoever is claiming through them from withdrawing, receiving payment or in any manner dealing with the money paid into the account number 0170291183921 in the name of ADO BRO COMPANY LIMITED at Equity Bank Community Branch Nairobi by African Development Bank.***

***2(b) That the Honourable Court be pleased to direct the Interested Party's Bank to allow the Applicants WINFRED WANJA MBOGO ID No. 22182370 and SOSPETER ONUNDA WAGA of ID No. 13895307 to withdraw the sum of Kshs.20,063,153.00 from account number 0170291183921 without reference to the 2nd Respondent.***

***3 That the court be pleased to authorize and reinstate the 2nd Applicant one WINFRED WANJA MBOGO OF KENYA NATIONAL IDENTITY CARD NUMBER 22182370 and 3rd Applicant one SOSPETER ONUNDA OWAGA OF KENYA NATIONAL IDENTITY CARD NUMBER 13895307 as signatories of the stated***

**account number 0170291183921 at Equity Bank, Community Branch in the name of ADO BRO COMPANY LIMITED, and they be allowed to withdraw the Kshs.18,237,094 as signatories of that account forthwith.**

**3(a) That the Honourable court be pleased to authorize and restrain the 2nd and 3rd Applicant WINFRED WANJA MBOGO – and SOSPETER ONUNDU OWANDA respectively as signatories to bank account number 0170291183921 at Equity Bank Community Branch without reference to the 2nd Respondent.**

**4(a) In the interim the Honourable court be pleased to make an order directing the Interested Party to supply the Applicant with the statements of the account number 0170291183921 Equity Bank Community Branch Nairobi covering the period of 18th April 2011 up to date.**

3. The application is premised on the grounds set out therein and is supported by affidavit of SOSPETER ONUNDA MBOGO dated 22nd April 2014 and its annexure, and a supplementary affidavit of the same person dated 22nd April 2014.
4. The application is opposed by the 1st Defendant Company through a Replying Affidavit of **ROBA DUBA BONANA** dated **6th May 2014** with annexures. The Respondents have also raised a Preliminary Objection through its Notice dated **9th May 2014** to the effect that:-
  - i. **There is no suit property before the court for determination.**
  - ii. **The suit has been commenced through unprocedural means and thus is fatally defective.**
5. In brief, the history of the application is that sometime in the year 2011 the 1st Respondent Company secured a contract to construct a bridge in North Eastern at Lalapasi, Arapal and Ndikiir Parsi in Marsabit South North Kshs.38 million. The Company started the works, but midway, after spending Kshs.14,000,000/= ran out of funds and still required Kshs.24,000,000/= to complete the projects. On or about 30th September 2013 the 1st Respondent Company agreed with the Applicants that the Applicants would give the funds to complete the project, and in consideration the Applicants would share in the profits and would also be signatories to the account into which the African Development Bank, the financier, would deposit the money. Their being signatories to the account was to secure their interest in the project. The parties then entered in an agreement to that effect dated 30th September 2013. Most of these facts are not disputed and so I will not narrate them here, suffice to add that when the project was completed and the African Development Bank released the funds to the account number 0170291183921 which was opened by the parties at Equity Bank Community Branch Nairobi, the 2nd Respondent then moved to discharge the 2nd and 3rd Applicants as signatories to that account. In the meantime, the Applicants claim that the 2nd Respondent has refused to pay them their dues after performing their part of the contract, and that the said dues amount to over Kshs.18.0 million, despite the fact that the Applicants had taken loans with banks in order to secure the completion of the project in time and that the said loans are attracting punitive interest rates.
6. In response to the claim the 2nd Respondent does not deny the facts as alleged or that indeed the Applicants were his partners or that they actually put their money into the project. The 2nd Respondent merely adds that the issue at hand is that of accounts. The Applicants were to be paid after all the expenses of doing the project had been deducted. However, when the Applicants gave out their list of expenses, the 2nd Defendant in his replying affidavit states that those expenses are exaggerated are unbelievably high, and are not an estimate of what expenses would look like, and that until the same is determined and agreed either in this court or in any other forum, the profits, if any, in terms of the parties cannot be determined or released. The 2nd Defendant states in his affidavit that the removal of the Applicants from being signatories was not in bad faith but that their tenure as signatories lapsed automatically as it was to be from 1st October 2012 to 31st December 2013.

7. From the above history and submissions of the parties the issues for me to determine are as follows:-
  - i. ***The place of the Preliminary Objection and other technicalities.***
  - ii. ***Whether there is a prima facie case by the Applicants.***
  - iii. ***Security for the Applicants interests.***
8. The Respondent raised a Preliminary Objection vide their Notice dated 9th May 2014. They stated that there is no proper suit before the court and that the process was commenced through unprocedural means and thus fatally defective. That allegation may be correct
9. The Applicants have also alleged that the 2nd Respondent has no authority to swear the Replying Affidavit on behalf of the 1st Respondent, and that any such authority cannot be based on a letter (**RDB1**) (as opposed to a resolution), and that on the basis of this assertion the application is not opposed as there is no valid replying affidavit on record.
10. I choose, under Article 159 2 (d) of the Constitution, to disregard these technicalities so as to address the bigger issue affecting all the parties. The bigger issues for me is that the parties agreed that they partnered to carry out a project. After the completion of the project they have disagreed on how to share the profits, if any. This court is obligated to assist the parties to arrive at a solution rather than using a technicality to scuttle the parties to the the four winds. The parties came to this court for a solution, and a solution they shall find.
11. I am impressed with the candidness of the 2nd Respondent in this matter. He has stated that the only problem is that it has not been determined the extent of expenditure. He cannot just pay expenditures which have been given to him by the Applicants without interrogating and verifying the same. He says those expenditures are grossly exaggerated. I have looked at those expenditures. I cannot comment on whether or not they are exaggerated, only to say that they are not little sums of money. I agree with the 2nd Respondent that those expenditures must first be determined before any money can be paid out to the Applicants.
12. At the same time, I agree with the Applicants that they have done work and successfully completed the same and that they should be paid. If that payment is not forthcoming, the Applicants should be provided with some sense of security that the money is intact and that they will finally be paid after the expenses reconciliation is carried out. In this regard, the Applicants have proved to me that they have established a case with probability of success which would entitle them to injunctive remedies as per the **GIELLA – VS – CASSMAN BROWN** Case. However, their remedy need not be an injunction. Their remedy is a situation which makes them to retain oversight of the said account Equity Bank A/c number 0170291183921.
13. It has been proved to me by the Interested Party being the said Equity Bank, that the said account is indeed active and that there is money in the said account of more than Kshs.20,000,000/=. The bank is not interested in these proceedings except that they have been joined as the custodian of that account.
14. In the circumstances, the best order that appeals to my sense of justice now is to preserve the said account until the warring parties herein either agree on the said expenses, or until this matter is heard and determined in this court.
15. In the upshot, I make the following orders:-
  - a. ***The Defendants or their agents or servants are hereby restrained form transacting any business in account number 0170291183921 in the name of ADO BRO Company limited of Equity Bank Community Branch, Nairobi.***
  - b. ***The said account number 0170291183921 is hereby frozen with immediate effect and the Interested Party, Equity Bank is hereby notified accordingly.***
  - c. ***The said account in (a) and (b) above shall remain frozen and inactive until further orders of this court but shall continue to earn appropriate or applicable interested as per***

*the banks regulations.*

d. *Costs of this application shall be paid by the Respondents as follows:-*

*Kshs.20,000/= to the Applicants.*

*Kshs.10,000/= to the Interested Party*

**DATED, READ AND DELIVERED AT NAIROBI**

**THIS 11TH DAY OF JULY 2014**

**E. K. O. OGOLA**

**JUDGE**

**PRESENT:**

Okach for Applicant

No appearance for Respondent

M/s Kariuki for Interested Party

Teresia – Court Clerk