REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMDIRALTY DIVISION

CIVIL SUIT NO. 49 OF 2014

QUICK HANDLING AVIATION SERVICES LIMITED.....PLAINTIFF

VERSUS

ADAN NOOR ADAN .....DEFENDANT

RULING

Application for injunction

[1] The Applicant has applied by way of Notice of Motion dated 18th November, 2013 for an injunction to restrain the Defendant from dealing and or transacting in the Plaintiff Company's business and or other business on behalf of the company pending the hearing and determination of this suit.

[2] The application is founded on the supporting affidavit of Mohamud Abdi Hussein sworn on 18th November, 2013 and supplementary affidavit of Abdikadir Ali Duale sworn on 24th March, 2013. The affidavits reveal the following allegations:-

v. **That the Defendant is a director as well as a shareholder of the Plaintiff Company and that since incorporation, he had been in charge of running its day to day affairs.**
vi. **That the Defendant has in his possession all the documents including bank statements, correspondences and other important materials in relation to the company. The Defendant has failed to furnish the Plaintiff with the documents in his possession for purposes of filing the mandatory annual returns.**
vii. **The Defendant is being accused of; misusing the company property; failing to file the annual returns of the company; and has illegally opened an account with the Kenya Commercial Bank, Wajir Branch in the name of the Plaintiff.**
viii. **That for the foregoing reasons, the Directors of the Plaintiff resolved on 23rd October, 2013 that the Defendant should be removed as a director. In addition, it was also resolved that the Plaintiff would obtain a court order through their appointed advocates M/s Jackson Omwega & Co. Advocates to remove the defendant as the Director of the Plaintiff.**
ix. **Mahumud Abdi Hussein had the authority to swear the affidavit herein on behalf of the Plaintiff and consequently the suit before the court was competent.**

[3] The Applicant elaborated the above grounds in its submissions and alleged that the resolution to remove the Defendant as a director was informed by the mismanagement of the Plaintiff Company's affairs by the Defendant. The Applicant argued that the decision to remove the Defendant from directorship was made by the majority and the rule is that the decision by majority should prevail. In

support of this submission, the Plaintiff relied on the case of **ANSPAR BEVERAGES LIMITED v DEVELOPMENT BANK OF KENYA LIMITED & OTHERS CACA NO NAI OF 2003** which quoted **Melish L.J.** in **MACDOUGALL V GARDINER 1875 1 Ch. D 13.** The Plaintiff therefore urged the court to grant the orders sought in the application.

Defendant's Case

[4] The Defendant filed a replying affidavit and further affidavit sworn on 20th February, 2014 and 22nd April, 2014, respectively. He also filed grounds of objection and written submissions in respect of the application. The Defendant averred that the entire suit plus the application were incompetent and, therefore, an abuse to the court process. First, there was no resolution by the Company to file this suit. He relied on **AFFORDABLE HOMES AFRICA LIMKITED v HENDERSON & 2 OTHERS [2004] eKLR**. Secondly, there was no leave of court granted to the directors to file this suit as a derivative action and the same should therefore be struck out. And thirdly, the Defendant posits that the court has no power to remove a director or determine directors of a company.

[5] He confirmed, however, that he has been in the active management of the Plaintiff Company since its incorporation partly because the co – directors were not interested in the running of the company's business and gave him a signed authority to do all that was necessary to run the business. The Defendant denied all the allegations of mismanagement claimed by the Plaintiff and accused his co- directors of plotting to destroy the Plaintiff Company by removing him as a director. He contended that should the court grant the orders sought; the same would completely cripple the running of the Plaintiff.

[6] The Defendant argued that the threshold in the case of **GIELLA –VS- CASSMAN BROWN** for grant of temporary injunctions had not been met. The Plaintiff had not even sought for a permanent injunction in its Plaint which is a mandatory prerequisite. He relied on the case of **NGORIKA FARMERS CO-OPERATIVE SOCIETY LTD –VS- JOHN KIARIE & 2 OTHERS (2006) EKLR** and **FRANCIS M. MUTUA –V- SOUTHERN CREDIT BANKING LIMITED CORPORATION LTD (2010) eKLR**.

[7] The Defendant made further submissions; that the procedure used to remove him from directorship of the company was not in accordance with the Plaintiff's Memorandum and Articles of association. For the foregoing reasons, the Defendant urged the court to dismiss the Plaintiff's application with costs.

COURT'S RENDITION

[8] This is a case for a temporary injunction. The legal threshold for the grant of interlocutory injunction is well set out in **GIELLA –V- CASSMAN BROWN & CO. LIMITED (1973) EA 3585** that: the 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 adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide the application on the balance of convenience. It is therefore essential to examine whether the Plaintiff has met the above thresholds so as to order an interlocutory injunction against the Defendant. To reach there the court will determine the various issues raised by the parties.

[9] From the extract of the record of the Registrar of Companies annexed to the application, i.e. Form CR 12 dated 20th December, 2012, the Plaintiff Company is composed of four directors including the Defendant. Each of the four directors hold 100 shares out of the 400 shares issued. The major reason of removing the Defendant from directorship was alleged mismanagement of the Plaintiff Company. The removal of the Defendant as a director of the company was in a resolution made on 22/10/2013. Undoubtedly, Article 34 of the Memorandum and Articles of Association of the Company provides for removal of directors of the company. Also through a resolution of the same date, the Defendant was removed as the Managing Director and another Managing Director was appointed. Article 26 of the Memo and Articles of Association of the Company provides for appointment of a director to manage the company's daily operations. The two resolutions have not been superseded by other resolution. The Defendant was also appointed in similar manner under the Memo and Articles of Association of the

Company. Therefore, I do not understand why the Defendant insists on remaining a director and or Managing Director of the Plaintiff Company when there is a resolution of the company on the matter. In such circumstances, it is not a matter of the court removing him as a director or determining directors of a company; it is a matter of removal of a director through a resolution of the company. I say this because a resolution of a company does not need any superadded authority of the court for it to take effect. It is effective on being passed and registered with the Registrar of Companies. I do not think it is necessary to apply for a declaration that a person has ceased to be a director once a resolution is passed and duly filed. Except, where the Registrar has failed or refused to register the resolution, which is not the case here. That is enough on that point in order to avoid pre-empting substantive arguments during trial on the propriety of the procedure that was followed in passing the resolution.

[10] But where it is proved that a person who has been removed as a director or Managing Director is meddling with the business or running of the company, the company is entitled to apply for relief including a temporary injunction. That is quite apart from the scenario I have tackled in the last part of the foregone paragraph. The Defendant has admitted that he is seized of all company affairs and has been running the company singled-handedly. His fear is that the other directors are not conversant with the business of the company and will only destroy the company. The Defendant seems to suggest he is still in control of the company which renders credence to the need to stop him by way of a temporary injunction. The Defendant should also know that the greatest innovation in company law since the land mark case of **SALOMON v SALOMON** is that the company is a legal person separate from the people who compose it and for him to suggest he is almost indispensable for the survival of the company or he is synonymous to the company supports issuance of an injunction. There is also absolute possibility of interference with the Plaintiff's operations by the Defendant as he has in his possession all company documents and books. More fundamental issue is that the Defendant is also a signatory to various bank accounts belonging to the Plaintiff. In view of the resolution and the real possibility of meddling by the Defendant with the company business, the Plaintiff has established a prima facie case with high chances of success. It is essential for the court to issue a temporary injunction against the Defendant from dealing or transacting any business on behalf of the company.

[11] One more thing: the Defendant questioned whether this suit is properly before the court. His argument that there was no resolution for a suit to be commenced on his removal is starkly indefensible as there is a clear resolution on the matter. That aside, I am more puzzled by the suggestion by the Defendant that this is a derivative action by the other directors and so they should have obtained leave of the court to file such derivative action. This suit has been filed by the company upon a resolution to that effect. In law, needless to state, a company cannot file a derivative action. It files a direct suit in its name. Accordingly, the issue of leave of court to file a derivative action does not arise.

[12] Perhaps there is a misconception of what a derivative action is. And the following rendition is important. According to the **Black's Law Dictionary, 9th Edition,** derivative suit or action is:

''**A suit by a beneficiary of a fiduciary to enforce a right belonging to the fiduciary; especially, a suit asserted by a shareholder on the corporation's behalf against a third party (usually a corporate officer) because of the corporation's failure to take some action''.**

[13] A derivative action is filed by a shareholder or director on behalf of a company where there has been a dereliction on the part of the company to file the suit to enforce a right or remedy due to the company. Derivative action is the exercise of the exception to the rule in **FOSS V HERBOTTLE (1843) 2 HARNE 461**, which stated that:-

"In law the corporation and the aggregate member of the corporation are not the same thing for purposes like this, the only question can be whether the facts alleged in this case can justify departure from the rule which prima facie would require that the corporation should sue in its own name and in its corporate character, or in the name of someone whom the law has appointed."

[14] See also the decision by **Mwera J** (as he then was) in the **DADAN V MANJI & 3 OTHERS HCC 913/2002** that:-

"It is a cardinal principal in company law that it is for the company and not the individual shareholder to enforce rights of action vested in the company and sue for wrongs done to it. That in the absence of illegality, a shareholder cannot bring proceedings in respect of irregularities in the conduct of the company's internal affairs in circumstances where the majority are entitled to prevent the bringing of an action in relation to such matters."

[15] Clearly, only a shareholder can file a derivative action and only where there is illegality or fraud for which the company has failed to file suit to seek a remedy or a vindication of its right. Matters of management of the company or believe that the other directors are not conversant with the business of the company or that they have a grudge with the Defendant, cannot found or convert this case into a derivative action. The suit is by the company in its own name and needs no leave to file such legal proceedings. Doubtless, this is not a suit by the directors or shareholders in the sense of a derivative suit. The objection, thus fails.

[16] The Defendant made yet another startling submission; that there is no prayer for injunction in the plaint. Judicial ink available to pen down the answer thereto is that; a permanent injunction has been sought in Paragraph 13 of the Plaint at prayer number (a) as follows:

"A declaration that the Defendant is no longer a director of the Plaintiff and <u>a permanent injunction restraining the defendant whether by himself, agents, servants or howsoever otherwise from holding himself out as a director of the Plaintiff</u>." (emphasis mine)

.But I agree with the Defendant that the Applicant has not specified in the application whether it is seeking a temporary or interlocutory injunction. Although the Applicant has not specifically used the terms temporary or interlocutory or permanent in the Application, it is easily discernible from the tenor and the words used in couching the prayers, that it is seeking a temporary or interlocutory injunction. The Applicant has used the words ''pending the hearing and determination of this suit'' which can only mean the remedy sought is intermediate or interlocutory in nature. However, parties should always cast the relief they are seeking in the application with such particularity and precision, in order for the other party and the court to understand the remedy being sought. The objection based on that ground fails too.

CONCLUSIONS AND ORDERS

[16] The Plaintiff has established a prima facie case, for, in view of the fact that a resolution has been passed to remove the Defendant as a director and managing director of the company, continued involvement of the Defendant in the operations of the company will only be injurious to the company and the law. Further, the fact that the Defendant is in possession of the company documents and books and he is a signatory to various bank accounts operated by and belonging to the Plaintiff, only enhances the possibility of meddling by the Defendant with the operations of the plaintiff company. All these when placed on the scale, preponderantly supports the grant of an injunction against the Defendant. There is a real possibility that the Plaintiff Company's property might be dissipated. It bears repeating, any continued activities by the Defendant in respect of the business or operations of the company is a violation of the law which, I have said time and again, constitutes irreparable damage to the Plaintiff not compensable in damages. Even the balance of convenience in this case favours the granting of an injunction against the Defendant. It is so ordered. As a corollary relief, the Defendant should also forthwith release all documents and books of the company which are in his possession to enable the Plaintiff to file the statutory mandatory annual returns.

Dated, signed and delivered in open court at Nairobi this 9th day of July, 2014

F. GIKONYO

JUDGE