



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
COMMERCIAL CIVIL CASE 5 OF 2010

1. KILINDINI WAREHOUSES (K) LIMITED

2. AWADH SALEH SAIDPLAINTIFFS

VERSUS

1. OMAR SALAEH SAID

2. BARIKA MOHAMED SHERMAN..... DEFENDANTS

Coram:

Mwera J.

Oguk, Ok'ongo for Plaintiffs

Balala, Okaalo for 1st Defendant

Odipo for Applicant/Interested parties

RULING

The notice of motion dated 3rd April, 2012 was filed by the 2nd defendant/applicant (Barika Mohamed Sherman) under Order 40 rules 1, 2, 3, 4 of the Civil Procedure Rules and sections 1A, 1B, 3A, 63 (c) (e) of the Civil Procedure Act.

The main prayers were:

(i) to restrain the plaintiffs from tampering or reconstituting the board of directors or shareholders, altering the records of or dealing in any way with the assets of the 1st plaintiff company or in any way altering its status as a company;

(ii) to direct that the 2nd defendant/applicant do sit temporarily as a director of the 1st plaintiff company.

It was stated in the grounds that the 2nd defendant/applicant had been conditionally appointed as grantee of probate in respect of the estate of the late Mohamed Swaleh Said Sherman who was a lawful/beneficial owner of the 1st plaintiff company. That the applicant herself was an heir and one of beneficial owners of

the 1st plaintiff company. She is thus directly affected by the illegal dealings and other fraudulent transactions executed by the 2nd plaintiff in the 1st plaintiff company. That the 1st plaintiff company was always a family holding with various legal and equitable interests due to the applicant/2nd defendant. Further, that the current and past registered shareholders and directors of the 1st plaintiff have been in such positions in their fiduciary capacities and as trustees of the owners of the partnership called **Swaleh Nguru Investments Group** also known as **MESSRS SWALEH** in which the applicant and her late husband Mohamed Swaleh Said Sherman, over whose estate she holds a conditional grant of letters of probate had rights. And that she was heir in the first degree. So if orders sought are declined, she stands to suffer irreparable damage while if granted, the respondents will suffer none. As at this point if it may be noted, it has not been stated as to the whereabouts of the 1st defendant (Omar Saleh Said) or his relationship in/with the other litigants. No link yet is established between the 1st plaintiff – a **limited liability company** and a **partnership** called Swaleh Nguru Investment Group. Probably that will unfold presently.

In the 2nd defendant/applicant's supporting affidavit, it was deponed, that the 1st plaintiff company was/is a **family holding** set up/built with funds from a **family partnership** above noted which was set up by an agreement dated 28th September, 1977 (exhibited). And that audited accounts for the years 1998 and 1999 of that partnership featured the 1st plaintiff company as an asset thereof. Looking at accounts, one notes the subject body as **Messrs Saleh** (not Swaleh) and among the current assets is one named **Kilindini Warehouse** (not Kilindini Warehouses (Kenya) Limited). That to the applicant's own knowledge, the partnership known as **Swaleh Nguru Investments Group** and also known as **Messrs Swaleh** had one of the partners, the late Mohamed Swaleh Said Sherman, the applicant's deceased husband. That she holds a conditional grant of probate on that account. It was averred further that the applicant knew from her own knowledge and study of the company records in her possession that the 2nd plaintiff had falsified documents and perpetrated frauds against the 1st plaintiff as well as against his own kin in these proceedings. To continue in that line, the 2nd plaintiff has thus brought these proceedings to obtain court orders for a cover in order to gain sole control of the 1st plaintiff with its assets. That all those acts, steps, etc. could and do great damage/loss to the applicant – hence the orders being sought. That the applicant and the 1st defendant are conditional co-grantees of letters of probate to the deceased Mohamed Sherman – the financier and beneficial owner of the 1st plaintiff company. It was repeated how the said partnership was a **family** firm and the 1st plaintiff company a **family** holding. And that with all those family ties and involvements, the applicant was directly and fundamentally affected in the whole matter hence this application. That the registered shareholders and directors of the 1st plaintiff held fiduciary positions to, and in trust of the defendants. As at this point the names of six (6) partners in **Messrs Saleh** are:

1. Mr. Awadh S. Sharman
2. Mr. Said S. Sharman
3. Mr. Mohamed S. Sharman
4. Mr. Omar (Farouk)
5. Mr. Mohsin S. Sharman
6. Mr. Hussein S. Sharman

On 4th April, 2012, Mwongo J. granted an injunction to restrain the plaintiffs (prayer (i) above and ordered the matter do proceed to hearing *inter partes*.

The 2nd plaintiff (Awadh) filed a 76 - paragraph replying affidavit! He stated that he had authority of the 1st plaintiff company to so reply. The 2nd plaintiff went over the history, legal and family position preceding these proceedings. That the matters complained of took place in 1999. The 2nd defendant came

to know of the same in 2001. She filed an application in Succession Cause 145/1998 seeking to restrain the 2nd plaintiff from dealing with the assets of the 1st plaintiff. Although it was not averred as to what became of that application, the 2nd plaintiff deponed that the present application being based on tort of fraud or breach of trust/fiduciary duty, is an abuse of the court process because it is coming long after the 3 year and 6 year time bar respectively having expired from the date the cause of action accrued. So this application was without basis.

As for the counter-claim said to have been filed along with the defence herein, the 2nd plaintiff averred that the 2nd defendant had no capacity to bring proceedings on account of wrongs claimed to have been committed against the 1st plaintiff. That it was misconceived that the deceased Mohamed Sherman, husband of the applicant, owned the 1st plaintiff company, which was a separate legal entity from its shareholders and directors. There was a long discourse on issues and principles governing limited liability companies which, put together, did not permit for the 2nd defendant to bring or litigate as she is doing, because Mohamed Saleh Sherman or the Swaleh Nguru Group could not lay any claim on the assets of the 1st plaintiff. The applicant had no legal/equitable rights/interest in the assets of the 1st plaintiff and her conditional grant of probate did not entitle her to maintain proceedings as she is doing here. That the conditions set out by Ibrahim J., as he then was, on 18th November, 2010 had not been complied with and so the applicant was holding a grant which had no effect or authority. The order was exhibited by the 2nd plaintiff – not the applicant.

It was disclosed to the court that the 1st defendant (Omar) filed a cause to wind up the 1st plaintiff. It is still pending and issues raised there (MBA HCCWUC No. 1/2010) are similar to those raised in the counter-claim herein. That the applicant joined the winding-up cause as an interested party, – facts not disclosed here. A copy of the petition to wind-up the 1st plaintiff together with the 2nd defendant/applicant's affidavit therein was exhibited (annexure ASS2). That, had such material been placed before Mwongo J., he could not have given the interim order aforesaid, because section 224 of the Companies Act could have kicked in – barring the disposal of any property of the 1st plaintiff. That, the applicant, was guilty of non-disclosure of material facts, and in any event, if her prayers are granted, that will mean shutting down the operations of the 1st plaintiff altogether to the detriment of employees, etc.

The 2nd plaintiff maintained that appointment of directors and any changes/transactions made, fell within the Memorandum and Articles of Association of the 1st plaintiff and not this court. There was then an argument directed against the validity of the counter-claim in this suit. That did not appear to fall within the present proceedings.

The court heard that there was no evidence that the 1st plaintiff was established with finances from a family partnership (above). It did not incorporate the 1st plaintiff either. The 2nd plaintiff had not effected any changes to defraud the 1st plaintiff or anything as claimed by the 2nd defendant and no evidence of trust or fiduciary duty as claimed, had been put forth by the applicant. Finally, prayers herein if granted would greatly prejudice the 1st plaintiff. And with similar prayers of injunction featuring in the winding-up cause, the proceedings herein ought to be stayed and the interim orders discharged, while all the rest will be litigated in the winding-up cause.

The 1st plaintiff then gave notice of preliminary objection to the effect that the 2nd defendant was not appointed administratrix/executor of the estate of the late Mohamed Saleh Sherman as per the court's order of 18th November, 2012 (see above) and there ended the replying affidavit.

The record also bears the 2nd plaintiff's (Awadh) affidavit in response to what was called affidavit of the 2nd defendant sworn on 3rd April, 2012. After his affidavit in reply filed on 12th April, 2012, it was not easily made clear to the court why this other one was filed in court on 24th April, 2012. Then, the same 2nd defendant filed an affidavit in reply to the supplementary affidavit sworn on 19th April, 2012. It was in response to the 1st plaintiff's replying affidavit sworn by the 2nd plaintiff. It now acknowledges the

winding-up cause in which the 2nd defendant was joined. Anyway, the affidavits that were filed appeared to repeat one another.

Directed to submit, each side seemed to expand on what was already in its affidavit, save to add authorities, but then maintaining its stand all over again. Though, not reproduced here but the impact of the arguments espoused does manifest itself and is duly incorporated in the following determination set on four (4) broad planes:

1. *A prima facie* case
2. Damages
3. Balance of Convenience
4. Other

The three (3) first planes are set out in the celebrated case of **Giella vs. Cassman Brown**. The position of the **other** will appear along.

1. **Prima Facie Case**: A party desirous of being granted a temporary injunction must set up a case at the first instance that the claim has, as it stands, chances/probabilities of success. At that first instance, the applicant should be forthright and honest in disclosing all material facts relevant to inform the Judge before he/she considers granting or refusing the *ex parte* injunction. In the event that at a later stage, e.g. during the *inter partes* hearing, it transpires that the applicant did know but concealed some relevant material earlier, then the court sitting will be justified to discharge the interim order by refusing to confirm it.

The basis on which Mwongo J. granted injunction was on the representation that the 2nd defendant/applicant was conditionally appointed a grantee of probate in respect of the estate of the late Mohammed Sherman, who ran a family partnership called Swaleh Nguru Investment Group which owned an asset called Kilindini Warehouses (K) Limited, the 1st plaintiff which the 2nd plaintiff was by fraud and other malpractices trying to control to the exclusion of others including beneficial owners as the 2nd defendant.

It has at this stage turned out that the conditional grant Ibrahim J. gave did not have effect until conditions set out there were fulfilled and in a given time frame e.g. that the petitioners in Succession Cause No. 145/1998, the 2nd plaintiff and another, give a full account of the subject estate in sixty (60) days; that they hand over all properties to the new administrators who could be appointed in three (3) months. If that was not done, those petitioners could not be discharged. The court directed that the present applicant could take the grant of the subject estate after the petitioners had handed/submitted the accounts and handed the estate to the new administrator. Such a new administrator was not stated. But that if such an administrator be the 2nd defendant/applicant, a beneficiary of the estate do move the court to determine that the 2nd defendant would administer the estate alone or jointly with some other. And if the family was for joint administration, it would agree on such or in default, file an appropriate application suggesting suitable persons for joint administration. Although the applicant claimed that she was a joint grantee (with the 1st defendant), first she did not annex this order **OR** most importantly, state whether the conditions in the grant were met or they were not. The plaintiff/respondents asserted that the conditions were not complied with, without disclosing which one or ones. But still the applicant had to demonstrate that she was a conditional grantee, and with interest/right to bring these proceedings, by demonstrating that the conditions spelled out were fulfilled. This was not done here and the court was left with the impression that the 2nd defendant had not made out a *prima facie* case to warrant being granted a temporary injunction. And that came by failing to establish that she held the position she claimed. And secondly, she had to establish what interest she had. She may be a beneficiary in the estate of Mohamed Saleh Sherman, yes, but through which route, this court was not told particularly as regards the assets and transactions of the 1st plaintiff. With the principles, laws, concepts, etc. governing partnerships and limited liability

companies it was a grave misconception on the part of the applicant to assert and maintain that since her late husband financed the family partnership, the Swaleh Nguru Investment Group, the resources transmitted accordingly to incorporate the 1st plaintiff company and so she has equitable and legal interest in its assets.

In law things do not operate that way. In the so-called partnership accounts placed before court, there appears an asset called Kilindini Warehouse, not Kilindini Warehouses (K) Limited – the 1st plaintiff. The two are separate entities and could not be or were not stated here to be one and the same entity. Anyway, would a limited liability company be an asset of a partnership in the manner argued here or in any manner at all? Hardly does this court think so. It was a novel argument and a marvel at that.

And some more of this, could the 2nd defendant or even if Mohamed Sherman himself was alive, claim direct interest in the assets of the 1st plaintiff simply because of shareholding? Not quite. So the 2nd defendant cannot claim, particularly in her position, that she has legal/equitable rights in the properties of the 1st plaintiff. Or that they are at some alleged risk – falsification, fraud, etc. which must be protected by an injunction. Therefore, on the aspects raised above, the order of injunction cannot issue.

The court remarked on non-disclosure of material facts being fundamental in considering to issue or refuse an injunction or any *ex parte* order for that matter. In the present proceedings, it is the plaintiffs who disclosed that there was this winding-up cause against the 1st plaintiff. It is still pending and the 2nd defendant/applicant joined that cause and sought injunction as she does here. She filed a defence and counter-claim here on 3rd April, 2012. It was not easy after reading and re-reading it to find from it any reference to the winding-up petition, where the plaintiffs claimed and it was not refuted, that this applicant prayed for similar order of injunction there and/or what became of the same. It is not explained here why. That ought to have been disclosed in the counter-claim or when the interim order was being pursued before Mwangi J. Then the Judge could have considered all relevant material presented before granting or refusing the injunction. He could still have gone on to grant it but with all relevant material facts disclosed. That is not what the 2nd defendant/applicant did here and it amounted to deliberate non-disclosure. On that account again, the injunction order herein shall not be confirmed.

2. **Damages:** This court is satisfied that in the event the 2nd defendant proves a case of loss of damage suffered by her in these proceedings, no doubt there is a monetary value to be assessed and the same could be awarded as damages. So an injunction will not issue now.

3. **Balance of Convenience:** The court is unable as at this point, having been unable to fix the applicant's status in these proceedings, to place the balance of convenience on the table so that all is seen as to in whose favour it will tip. Accordingly, it cannot be assumed that it will dip in favour of the 2nd defendant/applicant.

4. **Other:** Appreciating that the 1st plaintiff, a limited liability company is a legal entity governed by the Memorandum & Articles of Association, the instruments which regulate its businesses, functions, operations, transactions, etc., it would be imprudent for this court to get in all that and direct that a stranger, the 2nd defendant, be admitted and made a director in it. That would be introducing a stranger by the court – a thing company law and practice does not admit. Or even giving such orders as to stop operations, meeting liabilities, contractual or otherwise on application of an outsider. Probably that could be so in exceptional cases. But this is not one. It does not even get near one.

The other aspects put forth like the incompetence of this counter-claim or that these proceedings be stayed until the wind-up cause is determined, did not fall well within these proceedings.

In sum, the application dated 3rd April, 2012 is dismissed with costs.

Delivered on 11th July, 2012.

J. W. MWERA

JUDGE