



REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI
CIVIL CASE NO 1780 OF 1990

SHEETAL KHANNA.....PLAINTIFF

VERSUS

ZIPPY PRINT LIMITED & 2 OTHERS.....DEFENDANT

RULING

This is an application by the plaintiff for interlocutory reliefs under order

39 of the Civil Procedure Rules and, as is now usual where counsels are in doubt, under S 3A of the Civil Procedure Act. The application seeks the following orders, namely:

“(a) That the second and third defendants be restrained either by themselves or by their servants or agents or otherwise howsoever from dealing with shares and assets of the first defendant.

(b) The second and third defendants be restrained from managing and / or conducting the business of the company in any manner whatsoever without the consent and / or approval and participation of the plaintiff”.

The affidavit evidence herein show that prior to the events herein the second and third defendants and a company known as Bryanstone Marketing Services Ltd were the sole owners of the first defendant, with the said Bryanstone Marketing Services owning 2040 shares of the first defendant, representing 51% of the total shareholding while the two defendants held the balance. On account of this shareholding, the said Bryanstone had two directors while the defendants were also directors charged with day to day running of the business. They were however entitled to issue cheques of up to Shs 20,000/- only while those above Shs 20,000/- had to be countersigned by one of the directors appointed by Bryanstone, who also happened to be the current plaintiff and a Mr Nyaga.

On 26th February, 1990, the said Bryanston Company by an agreement dated the same day, sold its shares in the first defendant to the plaintiff without the consent of the defendants. The two defendants consequently refused to recognize the transfer and the plaintiff’s shareholding in the first defendant. On account of this non-recognition and refusal to be let into the management of the company, the plaintiff has brought this suit for a declaration that he is entitled to the said shares and meanwhile requires interim reliefs to preserve the status quo.

The defendants opposed this application as being unnecessary and that the balance of convenience required that the management remains in the hands of the defendants as was the case prior to the current sale of shares. The defendants however offered to give undertaking not to sell transfer or alienate any of

the shares or assets of the 1st defendant.

They also undertook to render statements of the affairs of the 1st defendant monthly or fortnightly. Further by paragraph 10 of their affidavit in reply, they agree to give further undertakings as may be deemed necessary to preserve the plaintiff's interest in the 1st defendant. At the hearing the defendant's counsel, Mr Murage also stated that the defendants were further prepared to undertake to allow the plaintiff or his agent to have access to the 1st defendant's business either monthly or fortnightly and further to allow the signing arrangements of cheques to include the plaintiff where the amount is over Shs 20,000/-. In other words, the defendants were prepared to have the status quo preserved until the determination of the suit.

According to the provisions of Order 39 Rules 1 and 2 of the Civil Procedure Rules, the court is given discretion "to grant such injunction, on such terms as to inquiry as to damages, keeping of account as the court thinks fit." However, in exercising such jurisdiction it is now settled law that the court has to be satisfied that the plaintiff has a *prima facie* case with a probability of success and that the breach feared is not capable of being adequately compensated by damages. Further, if the court is in doubt, then it is enjoined to act on balance of convenience. See *Giella vs Cassman Brown and Co Ltd* (1973) EA 358.

The current case relates to transfer of shares in writing in a private company. Such transfers are normally subject to the rules of the company which may or may not have been fulfilled by parties. However, as the transfer herein relates to majority share holding, the objection of minority of shareholders could be overridden by the majority shareholder or shareholders. It is however conceivable that the rules could require concurrence of all shareholders before transfer. Consequently in the absence of the tested evidence to be adduced during the hearing, it cannot be said that success is certain. I am however satisfied that on the affidavit evidence, a *prima facie* case has been demonstrated by the plaintiff.

On adequacy of damages, it is observed that the suit herein relates to shares in a private company not readily available on the market. They may also have sentimental value to the purchaser. Consequently it is clear that such a contract cannot be adequately compensated by an award of damages.

On balance of convenience, it is observed that the company is a running concern whose day to day operations were in the hands of the 2 defendants, while the plaintiff's predecessor in title had to sign all cheques over the amount of Shs 20,000/-. Consequently it would be in everybody's interest if such arrangements were continued.

In the circumstances, having regard to the aforesaid findings and the defendants' offers made in the court in the course of the hearing hereof and in the affidavit, I would make the following orders:

- (a) That the 2nd and third defendants be restrained by themselves or by their agents or servants or otherwise from dealing with the shares and assets of the 1st defendant until determination of this suit.
- (b) That all cheques for Shs 20,000/- and above issued by the 1st defendant shall from henceforth be countersigned by the plaintiff but those for less than Shs 20,000/- shall only require the signatures of the 2nd and 3rd defendants until determination of this suit.
- (c) That the 2nd and 3rd defendants shall grant the plaintiff or his agent access to the business on weekly basis for the purpose of ascertaining the trading and financial position of the 1st defendant and shall afford all reasonable facilities for such purpose including all financial and business records of the 1st defendant pending determination of the suit.
- (d) That the 2nd defendants shall provide the plaintiff with financial and business reports on weekly basis of the 1st defendant until the determination hereof.
- (e) The parties hereto shall have liberty to apply generally.
- (f) The costs hereof shall be in the cause.

(g) That the plaintiff hereby undertakes to indemnify the defendants in damages should his claim be unsuccessful.

Orders accordingly.

Dated and Delivered at Nairobi this 8th day of June, 1990

G.P. MBITO

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JUDGE