



REPUBLIC OF KENYA



**Ogada & another v Osser & 4 others (Civil Suit E022 of 2020)  
[2023] KEHC 27431 (KLR) (27 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 27431 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL SUIT E022 OF 2020  
DKN MAGARE, J  
APRIL 27, 2023**

**BETWEEN**

**FESTUS OCHOL OGADA ..... 1<sup>ST</sup> PLAINTIFF**

**HANS BRUNO HUSE ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**WILFRED GURNTHER HERBERT OSSER ..... 1<sup>ST</sup> DEFENDANT**

**RONNY PATRICK HERVERT OSSER ..... 2<sup>ND</sup> DEFENDANT**

**JEANINE NOTALE BOEHLIG ..... 3<sup>RD</sup> DEFENDANT**

**HANOS (KENYA) LIMITED ..... 4<sup>TH</sup> DEFENDANT**

**REGISTRAR OF COMPANIES ..... 5<sup>TH</sup> DEFENDANT**

**RULING**

1. This matter is coming up for Ruling on an application dated 7/10/2022. The Application first came up in court on 7/10/2022. The court gave directions that the same be fixed for directions on 17/10/2022. The prayers sought were as follows: -
  - a. That this application be certified as urgent and service of the same be dispensed with in the first instance.
  - b. That the court do appoint a Managing Agent from a list of the Registered Agents under *Estate Agents Act* Cap 533 Laws of Kenya to run the establishment.
  - c. That the Managing Agent in respect to the subject matters that is to say subdivision 2108 (Original Number 1669/18 CR 13796/7) and sub divisions 2124 (Original number 1669/18CR 13796/7) do deposit rent either to court or in the alternative to a joint account



to be opened by Birir & Co. Advocates, Ganzala and Ganzala, Advocates and Selina Egesa advocates.

- d. The Honourable Court be pleased to make such further or other costs as it may deem just and expedient in the circumstances of this case.
  - e. That costs of this application be provided for.
2. On 17/10/2022, the 2<sup>nd</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> Respondent sought and were granted 14 days to Respond. The Applicant required 7 days to file submissions.
  3. The court ordered that the applicant was to file a further affidavit within 7 days of service. The matter was mentioned on 7/12/2022. On the said date the 2<sup>nd</sup> 3<sup>rd</sup> and 4<sup>th</sup> Respondents' Advocates sought for time to file an application to withdraw from acting for their clients. The same was opposed. that the Applicant also resided in Germany and had complied and the Application was not made in good faith.
  4. The case was given another date. The same cycle again came up on 7/12/2022. The matter was mentioned on 9/3/2023 for directions. On that day, I gave directions that those who wished to file submissions could do so. The Applicant filed submission on 9/3/2023 and served on the same day.
  5. The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents filed their submission on 9/3/2023. They had filed a replying affidavit of 9/3/2023 and served on the same day. The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents filed their Submissions on 13/3/2023. They had filed a replying affidavit of 9/3/2023 through the 2<sup>nd</sup> Respondent. They also filed grounds of position dated 9/3/2023, though not signed.

### **Pleadings**

6. The Plaintiffs had filed suit on 24/11/2020. They were using a special power of attorney granted to the 1<sup>st</sup> plaintiff. The power reportedly was over a company, Hanos (Kenya) Ltd, where the said Hans Bruno Huse is said to have shares.
7. There is also another matter filed in Mombasa HCC 9 of 2018 – Wilfred Guenther Herber Osser =vs= Rony Patrick Notale Osser, Jeanaine Notale Osser and Hans (Kenya) Ltd, the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants. The plaintiff in the other matter is the 1<sup>st</sup> defendant in this matter.
8. The claim in this matter relates to transfer of shares. The Applicants had made an application to be joined in the proceedings in HCC 9 of 2018. The Application was dismissed by the court, though the court found that they had a prima facie case. There was no Appeal on the finding of having a prima facie case.
9. They were not joined to the case as they were unnecessary in that particular suit
10. The suit now seeks among other prayers to declare the change of shareholding structure not to be bona fides. They pray that the suit be restored to the way it was on 10/9/1986, among other prayers. This Application is meant to preserve status quo pending determination of this suit.
11. I am that the other suit is concluded in terms of hearing and is awaiting submissions. The matter is listed before me at the end of next month.



12. The main defence is that same matters as in HCC 9 of 2019. I have perused both complaints and orders made in the former, I note that the court did not non-suit the plaintiffs. The court, Hon Justice P.J. O Otieno held as follows in that case: -

“This however, is not to say that the applicant shall forever not pursue their claim. They can do so but separately without being imposed into the suit by the plaintiff in which the plaintiff is adamant that they will and no value if joined.”

13. I have seen the report from the DCI and it raises prima facie issues of fraud. The court must have had in mind the holding of the Supreme in the case of Mohamed Fugicha v The Methodist Church in Kenya (2019) eKLR, where the Supreme Court stated: -

“54] In like terms we thus observed in *Mumo Matemu v. Trusted Society of Human Rights Alliance & 5 Others*, Civil Appeal No. 290 of 2012 (paragraph 24):

“A suit in Court is a ‘solemn’ process, ‘owned’ solely by the parties. This is the reason why there are laws and Rules, under the Civil Procedure Code, regarding Parties to suits, and on who can be a party to a suit. A suit can be struck out if a wrong party is enjoined in it. Consequently, where a person not initially a party to a suit is enjoined as an interested party, this new party cannot be heard to seek to strike out the suit, on the grounds of defective pleadings.”

14. The 1<sup>st</sup> Defendant in their defence, at paragraph 12 states: -

“The 1<sup>st</sup> defendant avers that currently; he is not registered a director or shareholder in the 4<sup>th</sup> defendant...”

15. The defence does not deal with the status before “currently”. In respect thereof, I have in mind the decision of Raghibir Singh Chatte v National Bank of Kenya Limited [1996] eKLR, the court of Appeal had this to say as regards such pleadings: -

“As regards the statement of the law as set out in Halsbury’s Laws of England, the particular passage referred to is as follows: “General denial insufficient. It is not sufficient for a defendant in his defence to deny generally the grounds alleged by the statement of claim, or for a plaintiff in his reply to deny generally the grounds alleged in a defence by way of counterclaim: each party must deal specifically with each allegation of fact of which he does not admit the truth, except damages. When a party in any pleading denies an allegation of fact I the previous pleading of the opposite party he must not do so evasively, but must answer the point of substance. However, it has become common practice to use in a defence a traverse in a general form, this merely puts the opponent to proof.”

“After denying paragraphs 3 and 4 of the complaint, defendant in paragraph 4 of the defence pleads:- ‘In the alternative and without prejudice to the foregoing, the defendant avers that if any overdraft facilities were extended by the plaintiff to the defendant (which is denied) the same has been fully repaid up and discharged.’ The defence as framed as such is a bad defence. Defendant, if he indeed received the overdraft should admit so in his defence and then put forward a positive defence that he has fully repaid the overdraft. The defence as framed is evasive and does not put forward any positive defence on which issues can be framed for trial. So, even if the affidavit evidence is excluded, there is no reasonable defence pleaded and on that ground plaintiff’s application would succeed.”



16. The original 1<sup>st</sup> Defendant was substituted with Uwe Heinrich Gessner the Administrator of the Original first Defendant's estate. The amended plaint was filed on 2/8/2022.
17. The main issue is that the respondents are receiving rents from the parcel of land belonging to the 4<sup>th</sup> Defendant to the exclusion of the Applicant.
18. The ownership documents are not annexed to the application. However, there is no real opposition to the Application. The Applicant has established a prima facie case.
19. This case is real simple. That they were 50% owners of the company that is one share to 149. The other shareholding was held by the 1<sup>st</sup> Defendant. There appears to have been changes in shareholding. They did not participate in the transfer. No-one says they did transfer.
20. They all say that either the 1<sup>st</sup> defendant or the 1<sup>st</sup> defendant's wife transferred the shares. We do not know whether the transfers are legitimate. However, the preliminary finding by the police, is that the transfers were fraudulent.
21. Since, the police indicate that there is a possibility that the Transfers were fraudulent and other than the 2<sup>nd</sup> Respondent, the rest have not opposed the application. The grounds of opposition are not useful in the circumstances of this case. There are two reasons. They do not deal with factual issues raised and secondly they are not signed. I also note for almost ½ of the year the Respondents have been evasive in giving concrete reasons.
22. In the case of *Nguruman Limited v Jan Bonde Nielsen & 2 Others* [2014] eKLR the Court of Appeal was of the view that these tests are sequential. The Court stated: -

“In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;

- (a) establish his case only at a prima facie level,
- (b) demonstrate irreparable injury if a temporary injunction is not granted, and
- (c) allay any doubts as to (b) by showing that the balance of convenience is in his favour.

These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See *Kenya Commercial Finance Co. Ltd V. Afraba Education Society* [2001] Vol. 1 EA 86. If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit “leap-frogging” by the applicant to injunction directly without crossing the other hurdles in between.”

23. The next issue is whether the loss to be suffered is irreparable. It is seen that getting the Respondents even to file the Replying affidavit have been a herculean task. I do not know, how refunding will be done, if it comes to that. On the other hand, the 4<sup>th</sup> Respondent's money will be safe.



24. Once rent is collected, and placed in the hands of the Respondent it shall disappear in thin air. This is telling in that the rent has not been accounted. None of the new directors stated that they have control on where the rent is kept safely. The Parties are foreign nationals, currently out of jurisdiction of this court. They may not be compelled to return the rent collected. I am satisfied that the loss is irreparable.

25. In the case of *Champaklal Ramji Raishi Patel v I & M Bank Limited & 2 others; Ndeto Mutua (Intrested Party)* [2020] Eklr, The High Court, P J O Otieno sitting in Mombasa stated as doth: -

38. The second test, whether damages would be an adequate remedy, is not an absolute test that every time damages is demonstrated to be adequate no injunction issues. Rather the test is that, normally where damages are an adequate remedy, injunction should not issue. Ability to pay damages should not be the permit, for those able to pay, to violate the legal rights of the less able. In *Margaret Wanjiru T/A Peggy Phones Vs Peter Kamau T/A Kawandara General Stores & 2 Others* [2015] Eklr the court said: -

“On whether or not damages would be an adequate remedy, I am of the view that to deny a citizen guaranteed legal constitutional right is an extreme and harsh step that must be frowned upon. Frowned upon for it portends a situation where so long as one is endowed of financial muscle, he would offend and trod upon others rights and always demonstrate ability to pay. That would fly on the face of the constitutional dictate against discrimination and equality before the law. It shall open a window by which the financially strong would flout the law with abandon so long as they can pay damages. That has the inevitable prospects of a lawless society where monetary power and other ignoble considerations rather than civility and obedience to the rule of law would reign supreme.

It is not difficult to imagine the extent of anarchy and dissent that would then ensue with resultant disruption of smooth operation of orderly and legitimate commerce. Such is the scenarios all civilized societies seek to obviate by surrendering to the dictates of the rule of law and due process.”

26. I may not need to look at the balance of convenience. However, the money is safer held in one place till, the shareholding structure is settled. I am confident that this will also fast track the hearing of the suit.

27. I am also bound by the court of appeal decision in *Mombasa Bricks & Tiles Ltd & 5 others v Arvind Shah & 7 others* [2019] eKLR regarding the aspect of fraud. Fraud smacks of the lowest nadir in business relations and the court must, when prima facie evidence of fraud is raised, secure the integrity of business and commercial relations. The court of Appeal stated as doth: -

89. Further, we hold that notwithstanding the fact that the 4<sup>th</sup> respondent’s title was registered under Section 23 of the repealed Registration of Title Act the same was impeachable in the circumstances stated herein above. To that extent, we concur with Waki, J.A in *Kenya National Highway Authority vs. Shalien Masood Mughal & 5 others* [2017] eKLR wherein he quoted with approval the sentiments of the High Court in *Chemei Investments Limited vs The Attorney General & Others- Nairobi Petition No. 94 of 2005* to the effect that:-

*The Constitution* protects a higher value, that of integrity and the rule of law. These values cannot be side stepped by imposing legal blinders based on indefeasibility. I therefore adopt the sentiments of the court in the case of *Milan Kumar Shah & 2 Others vs. City Council of Nairobi & Another* (supra) where the Court stated as follows, “We hold that the registration of title to land is absolute and indefeasible to



the extent, firstly, that the creation of such title was in accordance with the applicable law and secondly, where it is demonstrated to a degree higher than the balance of probability that such registration was procured through persons or body which claims and relies on that principle has not himself or itself been part of a cartel which schemed to disregard the applicable law and the public interest.”

28. I have said enough to show that the Application is merited. I therefore allow the application in the following terms: -

- a. The company’s Assets, especially rental premises on various parcels formerly part of 1669/18 CR 13796/7 and sub division 2124 (original Number 1669/18 CR 13796/7 be preserved through: -
  1. Appointment of an agent to manage the said properties pending the hearing and determination of this suit.
  2. The advocates Representing the parties do open an escrow account, wherein the rent money should be deposited.
  3. Only a fraction not exceeding 10% shall be withdrawn for maintenance of the property and paying the Estate agents, and managing the account.
  4. There shall be no further changes in shareholding structures till the suit is determined.
  5. No money other than aforesaid shall be given to any of the parties.
  6. The agents shall only issue instructions issued by the court or jointly through the advocates now on record.
  7. Meanwhile pending appointment of agents, by the advocates on record, the rent received from the company premises be deposited in court.
  8. The matter be fast tracked.
  9. The plaintiffs to file referenced statements within 21 days to together with all documents.
  10. The Respondents to file referenced statements and witness statements within 30 days from today.
  11. The parties to fix the main suit of hearing and after the Ruling hereof.
  12. Costs in the cause.

**DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 27<sup>TH</sup> DAY OF APRIL, 2023.  
JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

**KIZITO MAGARE**

**JUDGE**

In the presence of:

Mr. Birir for the Applicant

Mr. Munywoki for 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendant

No appearance for 1<sup>st</sup> Defendant



