



**Welal & 2 others v Hassan & another (Civil Case E375 of 2022)  
[2023] KEHC 21676 (KLR) (Commercial and Tax) (28 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 21676 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL CASE E375 OF 2022  
FG MUGAMBI, J  
JULY 28, 2023**

**BETWEEN**

**HABIBA ALI WELAL ..... 1<sup>ST</sup> APPLICANT  
BUTULA ALI WELAL ..... 2<sup>ND</sup> APPLICANT  
MUNA ALI WELAL ..... 3<sup>RD</sup> APPLICANT**

**AND**

**ADAN YARE HASSAN ..... 1<sup>ST</sup> RESPONDENT  
FATUMA ABDULKADIR ALI ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

**Brief Facts**

1. Before the court is the application dated September 28, 2022 brought under Order 40 Rule 1 and 2 [Civil Procedure Rules](#), 2010, Section 1A,1B and 3A of the [Civil Procedure Act](#) and other enabling provisions of the law. The application seeks the following orders:
  - i. Spent
  - ii. Spent
  - iii. That pending the hearing and determination of the suit, the Honorable Court to order the money held in account No A0103606xxxxx National Bank of Kenya Limited, Eastleigh Branch amounting to KShs 4,681,825.25/- be divided to the parties respective accounts with 62.5% for the respondents and 32.5% for the applicants and sent to respective accounts of Aden Yare Hassan 01036063xxxxx (62.5%) and Habiba Ali Welal account No 010502284xxxxx(32.5%).



- iv. That pending the hearing and determination of the suit, the Honorable Court to order the respondents operating the agreed account number A0103606xxxxx in the name of Emirates Shopping Mall (Kenya) Limited held at National Bank Kenya Limited, Eastleigh Branch not to withdraw funds therefrom, make payments or in any manner deal with the funds therein without the mandatory signature of Habiba Ali Welal as per the executed bank mandate.
  - v. That this Honourable Court do issue orders directing that the matter be referred to court annexed mediation
  - vi. That this Honourable Court do issue such orders and give such directions as it may deem fit and just to grant.
  - vii. That costs of this application be in the cause.
2. The application is premised on the grounds on the face of it and supported by the affidavit sworn by Habiba Ali Welal . The applicant states that the parties are joint proprietors of the property known as Emirates Mall situated on Land Reference No 36/11/9 Eastleigh Nairobi where the respondents owned 62.5% whereas the applicant owned 37.5%. Disagreements between the parties led to the instant suit and as a result there has been no access to the funds held at National Bank of Kenya account number 010360694xxxx.
  3. According to the applicants, the Emirates shopping mall is resident to the National Bank Eastleigh branch which deposits quarterly rent of KShs 2,400,000/= to the aforementioned account. It is from this account that the applicant sought orders to have the bank deposit the rental income based on the percentage of the ownership. The applicants further contended that the suit could be amicably resolved through mediation as the parties involved were family members.
  4. The application was opposed through a replying affidavit sworn by Adan Yare Hassan on behalf of the respondents, on October 17, 2022 and written submissions dated July 19, 2023. The respondents admitted to the percentage of ownership as stated by the applicants. They however disclosed that the account in question, held at National Bank, is and has been dormant for a period of 9 years. There also appears to be a dispute over the moneys collected and paid into the account. The respondent claims that there are rent arrears due from the applicants 2 shops as well as a further amount of KShs 53,000,000/= being rental income that the applicants are yet to account for.
  5. The respondents therefore oppose the prayer to have the funds deposited into the National Bank Account as prayed by the applicants, stating that the same is a dormant account. Counsel further opposed the injunctive relief and submits that the applicants did not have a prima facie case as the as they had not disclosed to the court that they had not accounted for rental income for four years.

### **Analysis**

6. I have carefully considered the pleadings and the written submissions as well as evidence filed by opposing sides in support of their claims. The main issue for determination is whether the applicants have made out a case for the orders sought. The application was premised on Order 40 rule 1 and 2 of the *Civil Procedure Rules* which provides that:

“Where in any suit it is proved by affidavit or otherwise—

- (a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or



- (b) that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.”

7. The principles applicable in an application for an injunction were laid down in the celebrated case of *Giellla V Cassman Brown & Co Ltd*, [1973] EA 358. In summary, the Court held that in order to qualify for an injunction, first 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 harm which would not be adequately compensated by an award of damages and thirdly, if the court is in doubt, it will decide an application on a balance of convenience.
8. A perusal of the grounds of the application and the affidavit and evidence produced by the respondents leave no doubt at all that there is a dispute over the managing and running of the business that is jointly owned by the parties. It is also evident that there is disagreement over the running and management of the business account. The Plaint and Statement of Defense and Counterclaim filed by the parties herein are evidence of the fact that there are issues that can only be determined through evidence. This satisfies the first limb of the requirement, for a *prima facie* case.
9. The respondents have not denied that the business is jointly owned and that the applicants have a stake in the same. The applicants therefore stand to lose an amount that is at this stage not ascertainable to be compensated in damages because parties are at cross purposes. In order to preserve the subject matter of the suit I find that the balance of convenience tilts towards granting the application.
10. On the second issue, the applicant has sought orders to have the matter be referred to court annexed mediation. Article 159 (2) of the [Constitution](#) encourages the promotion of Alternative Dispute Resolution in resolving disputes. The [Civil Procedure Rules](#) also envisage the use of ADR. Order 46 Rule 20 stipulates to this effect that:
- “(1) Nothing under this Order may be construed as precluding the court from adopting and implementing, of its own motion or at the request of the parties, any other appropriate means of dispute resolution (including mediation) for the attainment of the overriding objective envisaged under sections 1A and 1B of the [Act](#).
- (2) The court may adopt an alternative dispute resolution and shall make such orders or issue such directions as may be necessary to facilitate such means of dispute resolution.”
11. There are also judicial pronouncements. One example is the case of [Patcab Tours & Another V Family Bank Tours & Another](#), [2019] eKLR, where the court observed that:
- “In deciding whether or not to refer a matter to mediation the court must weigh on the one hand its constitutional mandate to promote ADR as against, the duty of the court to ensure expeditious, fair and affordable disposal of suits as provided by Section 1A, 1B and 3A of the Civil Procedure Code.”



12. Further in *Muriuki Samson Murithi V Kirinyaga Dairy Farmers Co-op Society Ltd & Another*, [2017] eKLR, it was again observed that:

“The relevant provisions governing the application of ADR other than Article 159 of the *Constitution* of Kenya are section 59C of the *Civil Procedure Act* (Cap 21) and Order 46 of the *Civil Procedure Rules*. Section 59 provides, *inter alia*, that:

1. A suit may be referred to any other method of alternative dispute resolution where the parties agree or where the court considers the case suitable for such referral.
2. Any other method of alternative dispute resolution shall be governed by such procedure as the parties themselves may agree to or as the court may, in its discretion order.

On the other hand, the material provisions of Order 46 rule 20 Rules provide, *inter alia*, that:

Nothing under this Order may be construed as precluding the court from adopting and implementing, of its own motion or at the request of the parties, any other appropriate means of dispute resolution (including mediation) for the attainment of the overriding objective envisaged under sections 1A and 1B of the *Act*.

1. The court may adopt an alternative dispute resolution and shall make such orders or issue such directions as may be necessary to facilitate such means of dispute resolution.

It is clear from the above cited provisions of the law that ADR may be undertaken either by consent of the parties concerned or upon the court’s own initiative where the court is satisfied that a referral would be suitable. .... In my view, an ADR process should not be imposed upon an unwilling party unless there are compelling reasons for doing so. One of the important principles of a credible ADR process is that it should be voluntary. Parties cannot meaningfully engage in an ADR process under compulsion.”

13. Applying the above principles to the circumstances of this case, I note that the respondents have not opposed the proposal that the matter be subjected to court annexed mediation. The applicants have stated that the parties herein are all family members. For these reasons the court finds that this is a proper case for court annexed mediation.

#### **Determination and orders:**

14. For the avoidance of doubt, I find merit in the application and allow it on the following terms:
- i. That pending the hearing and determination of the suit, an order be and is hereby granted barring the respondents from operating the account number A0103606xxxxx in the name of Emirates Shopping Mall (Kenya) Limited held at National Bank Kenya Limited, Eastleigh Branch and in particular from withdrawing funds therefrom, making payments or in any manner dealing with the funds therein without the mandatory signature of Habiba Ali Welal as per the executed bank mandate.
  - ii. That the amount held therein shall not be subdivided amongst the parties so as to await the determination of the dispute in mediation.
  - iii. That the matter is hereby referred to court annexed mediation. Parties shall appear before the Deputy Registrar Mediation on a date to be agreed upon in court.



iv. Each party shall bear its own costs.

**DATED, SIGNED AND DELIVERED IN NAIROBI THIS 28<sup>th</sup> DAY OF JULY, 2023.**

**F. MUGAMBI**

**JUDGE**

Court Assistant: Ms. Lucy Wandiri.

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