



**Zeevi v Esmail; Isabirye (Interested Party) (Commercial Case E488 of 2022)
[2023] KEHC 20763 (KLR) (Commercial and Tax) (26 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 20763 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E488 OF 2022
DAS MAJANJA, J
JULY 26, 2023**

BETWEEN

GAD ZEEVI APPLICANT

AND

AKBER ABDULLA KASSAM ESMAIL RESPONDENT

AND

JAMES ABIAM MUGOYA ISABIRYE INTERESTED PARTY

RULING

1. This suit was commenced by an Originating Summons dated 4th December 2022 (“the Summons”). It is made under the provisions on Article 40(1) of the *Constitution*, Order 37(1) of the *Civil Procedure Rules* (“the Rules”), section 62 of the *Trustee Act* (Chapter 167 of the Laws of Kenya) and other enabling provisions of the law. It is supported by the Applicant’s own deposition sworn on 4th December 2022. The Applicant (“Zeevi”) seeks two reliefs in the Summons. First, a permanent injunction restraining the Respondent (“Esmail”), either personally or through proxy, as trustee for his shares in Lakeview Development Limited (“LDL”) from holding the General Meeting of LDL scheduled for 9th December 2022 and from considering, passing, or endorsing certain resolutions proposed in the agenda of the Notice of the Annual General Meeting dated 3rd November 2022. Second, a mandatory injunction directing Esmail to do all necessary acts to effect transfer of share(s) held by him in LDL back to Zeevi and to effect the change of directorship in LDL to Zeevi and his nominees.
2. The Summons was accompanied by the Notice of Motion dated 4th December 2022 made invoking, inter alia, Order 40 Rules 1 and 2 of the *Rules* principally seeking temporary injunction restraining Esmail, either acting personally and or through agents and or proxies, from holding the General



Meeting of LDL scheduled to be on 9th December 2022 at 2:30 pm, or at all, and from howsoever considering, passing or in any way endorsing resolutions on the proposed agenda contained in the Notice of an Annual General Meeting dated 3rd November 2022.

3. The application is supported by the grounds set out on its face together with Zeevi's supporting affidavit sworn on 4th December 2022. It is opposed by the Esmail through the Notice of Preliminary Objection dated 16th December 2022 and his affidavit sworn on 26th January 2023. The Interested Party ("Isabirye") also opposes the application through his replying affidavit sworn on 15th March 2023. To further support their arguments, the parties have also filed written submissions supplemented by oral submissions by their respective counsel.
4. Before I delve into the substance of the matter, a brief outline of the facts emerging from the depositions is necessary. In or around May 1980, Zeevi and Isabirye sought the services of Esmail, an Advocate, in relation to the purchase of a coffee farm being Land Reference No 28586 & 28587 on Peponi Road, within Nairobi ("the suit properties"). As the suit properties were agricultural land, Zeevi, being an Israeli national, could not at the time hold the suit properties in his own name as the law restricted ownership of that category of land by foreigners. It was thus agreed that Zeevi would get a Kenyan national to stand in on his behalf to facilitate purchase and that the properties would be acquired through LDL in equal shares between Zeevi and Isabirye. Thus, it is alleged, that Esmail was appointed trustee for Zeevi to hold one half share in LDL on his behalf and he was also appointed a director together with Isabirye. In the year 1990, Esmail resigned as a director and on 5th June 2020, Zeevi wrote to him seeking to terminate the trust and to formalize the transfer and directorship in the Company to himself and his nominee directors; Talia Zeevi and Ram Zeevi. He forwarded to Esmail and Isabirye the share transfer forms executory, a draft letter of resignation and a draft affidavit on the same requesting them to execute the documents and formalize the transfer and record the change of directorship.
5. According to Zeevi, Esmail and Isabirye are yet to act on the documents forwarded to them. That without his consent, Esmail issued a Notice of a General Meeting of LDL to be held on 9th December 2022 claiming to be a 50% paid shareholder. Further, according to the agenda of the meeting, he now seeks to oust Zeevi and his nominee directors and install other parties. Zeevi contends that Esmail has no legal right to convene and/or hold the General Meeting as Zeevi has not sanctioned the meeting and such meeting is against Zeevi's express instructions.
6. Zeevi contends that Esmail is a trustee shareholder in LDL and can act in accordance with and not contrary to his instructions. Zeevi claims that Esmail intends to appropriate the trust for himself, yet he is only recorded as a 50% shareholder in LDL as a trustee of Zeevi and has not paid up for any shares as alleged in the Notice of the General Meeting. Zeevi states that section 120 of the *Companies Act, 2015* acknowledges the limitation of the exercise of rights and powers by shareholders who hold such shareholding on behalf of other persons. That section 114(1) and (3)(c) of the *Companies Act*, further regulates the specified rights that a nominee can enjoy or exercise from the nominating member in relation to the company, as such the nominating member has the right to limit the rights and powers that can be exercised by a nominee under the said engagement. Therefore, Zeevi states that Esmail's rights and obligations were clearly limited to being the representative of Zeevi in the formation of LDL and to facilitate the purchase of the suit properties and that Esmail cannot exercise shareholder's rights beyond what has been authorised.
7. Zeevi states that Esmail relinquished the management of LDL to Zeevi in 1990 and was given clear instructions by the letter dated 5th June 2020 to execute all necessary documents necessary to formally vest shareholding of LDL back to Zeevi and his nominee hence he has no right in LDL save to



transfer the shares back to Zeevi and his nominee. Accordingly, Zeevi states that the General Meeting is, in effect, a coup, as Esmail, being a trustee shareholder, does not have, within the meaning of the provisions of section 120 of the Companies Act and contrary to the obligations and rights afforded to him as trustee by Zeevi under provisions of section 114(1) and (3)(c) of the Companies Act to call for such a meeting.

8. It is for the reasons outlined, that Zeevi seeks an injunction to forestall holding the General Meeting that would have the effect of expropriating his fundamental rights to property, that is, the shareholding of LDL, in contravention of the guarantee of protection under Article 40(1) of the Constitution.
9. Esmail opposes the competence and substance of the application. He states that the Summons is a nullity not having been issued by or on behalf of the Court, but by Zeevi's Advocates and that under Order 37 Rule 1 of the Rules, only "the trustees under any deed or instrument, or any one of them" are entitled to take out an Originating Summons for reliefs specified in the Rule. Alternatively, Esmail states that there is no admissible evidence before the Court in support of the Originating Summons or the application for an injunction and that the same is an action to enforce an illegal agreement or scheme to evade the provisions of the Land Control Act (Chapter 302 of the Laws of Kenya) and defeat Public Policy for creating an alleged trust of one share in LDL which Zeevi admits being fully aware of, and to have willingly participated in it ex turpi causa non oritur action. Further, that the alleged Trust was also void as no consent of the Land Control Board under the Land Control Act, was applied for or given for the alleged Trust and that the Trust of the share in favour of a non-citizen of Kenya is totally prohibited under the Land Control Act and against public policy; Thus Esmail states that there is no trust in existence in respect of which directions can be given by the Court and that the alleged agreement for Esmail to transfer the share was once again void as no application was made for the consent of the Land Control Board under the Land Control Act for such transfer within the time prescribed or at all. That the provisions of Order 40 rule 1 or 2 of the Rules do not apply and that the Originating Summons and reliefs claimed by Zeevi are barred by the provisions of the Limitation of Actions Act (Chapter 22 of the Laws of Kenya).
10. I propose to deal with the preliminary issues raised by Esmail in the Notice of Preliminary Objection dated 16th December 2022 as he challenges the jurisdiction of the court to entertain the Summons and the application herein. For a preliminary objection to succeed, the facts pleaded by the other party are assumed to be correct and must not be blurred by factual details calling for evidence or call upon the court to exercise discretion. The preliminary objection must raise a matter of law which can dispose of the application or the suit (see Hassan Ali Jobo & another v Suleiman Said Shabbal & 2 others SCK Petition No 10 of 2013 [2014] eKLR and Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors [1969] EA 696).
11. Although Esmail has raised several objections, the first objection is that the Summons is incompetent not having been issued by or on behalf of the Court but by Zeevi's Advocates and that it is in contravention of Order 37 Rule 1 of the Rules as only "the trustees under any deed or instrument, or any one of them" are entitled to take out an Originating Summons for reliefs specified in the Rule. Zeevi has specifically invoked the provision of Order 37 rule 1 of the Rules which provide as follows:

[Order 37, rule 1.] Who may take out originating summons and in respect of what matters.

- (1) The executors or administrators of a deceased person, or any of them, and the trustees under any deed or instrument, or any of them, and any person claiming to be interested in the relief sought as creditor, devisee, legatee, heir, or legal representative of a deceased person, or as cestui que trust under the terms of any deed or instrument, or as claiming by assignment, or otherwise, under



any such creditor or other person as aforesaid, may take out as of course, an originating summons, returnable before a judge sitting in chambers for such relief of the nature or kind following, as may by the summons be specified, and as circumstances of the case may require, that is to say, the determination, without the administration of the estate or trust, of any of the following questions-

- (a) any question affecting the rights or interest of the person claiming to be creditor, devisee, legatee, heir or cestui que trust;
- (b) the ascertainment of any class of creditors, devisees, legatees, heirs, or others;
- (c) the furnishing of any particular accounts by the executors, administrators or trustees, and the vouching, when necessary, of such accounts;
- (d) the payment into court of any money in the hands of the executors, administrators or trustees;
- (e) directing the executors, administrators or trustees to do, or abstain from doing, any particular act in their character as executors, administrators or trustees;
- (f) the approval of a sale, purchase, compromise or other transaction;
- (g) the determination of any question arising directly out of the administration of the estate or trust.

12. Based on the aforesaid provision, counsel for Esmail, Mr Ochieng Oduol, submits that the scope of what can be determined by an originating summons is limited to the matters outline therein. He points out that Order 37 rule 1 is clear and limited and cannot be extended to include determination of the kind of injunction sought by Zeevi. He further submits that in an originating summons, the court can only give directions and cannot deal with an application for injunction, mandatory or otherwise as sought and that to invoke the court's jurisdiction to grant an order which is not provided for under the Rules is to invite the court to exceed its jurisdiction as far as procedural jurisdiction is concerned.

13. The position taken by Esmail has been discussed extensively in various decisions cited by his counsel. In *Kenya Commercial Bank v Oisebe* [1982] eKLR, the Court of Appeal considered in detail the nature of an originating summons. Hancox JA, cited several decisions with approval including the dictum of Windham CJ, in *Ramji Kulsumbhai v Ramji's Executors and Others* [1957] EA 701 where he stated that, "It was pointed out in *Re Giles (2)* [1980] 43, Ch D 391, that such procedure was intended, so far as we can judge, to enable simple matters to be settled by the court without the expense of bringing an action in the usual way, not to enable the court to determine matters which involve a serious question." (see also *Bhari v Khan* [1965] EA 94). The position in Oisebe's Case (Supra) was affirmed by the Court of Appeal in *Kibutiri v Kibutiri* where the court once again stated as follows:

The procedure by way of originating summons is intended: "to enable simple matters to be settled by the court without the expense of bringing an action in the usual way, not to enable the court to determine matters which involve a serious question." This was said in *Re Giles (2)* [1890] 43 Ch D 391, a decision cited with approval by this court's predecessor in *Kulsumbhai v Abdulbussein* [1957] EA 699. See also *Bhari v Khan* [1965] EA 94 in which



it was held that the scope of an inquiry which could be made on an originating summons and the ability to deal with a contested case was very limited. When it becomes obvious that the issues raise complex and contentious questions of fact and law, a judge should dismiss the summons and leave the parties to pursue their claims by ordinary suit.

14. On the basis of the cases cited above, I would have struck out the Summons but the law has since changed. Order 37 rule 19 of the [Rules](#) provides as follows:

[Order 37, rule 19.] Powers of court upon hearing of summons.

19.

- (1) Where, on an originating summons under this Order, it appears to the court at any stage of the proceedings that the proceedings should for any reason be continued as if the cause had been begun by filing a plaint, it may order the proceedings to continue as if the cause had been so begun and may, in particular, order that any affidavits filed shall stand as pleadings, with or without liberty to any of the parties to add to, or to apply for particulars of, those affidavits.
- (2) Where the court makes an order under subrule (1), Order 11 shall apply.
- (3) This rule applies notwithstanding that the cause could not have been begun by filing a plaint.
- (4) Any reference in these Rules to proceedings begun by a plaint shall, unless the context otherwise requires, be construed as including a reference to a cause proceeding under an order made under subrule (1).

15. The Court of Appeal (per Ouko P.) stated in [Kenya Hotels Ltd v Oriental Commercial Bank Ltd \(Formerly known as The Delphis Bank Limited\)](#) Nrb CA Civil Appeal No 252 of 2009 [2019] eKLR that, “an originating summons cannot therefore be defeated merely because the dispute is highly contentious, complex or involving serious questions of law.” The court has the jurisdiction to issue directions and direct the manner in which it shall proceed. Subrule 2 of Rule 19 aforesaid is a clear that the even if the matter ought to have been commenced by way of a plaint, the court may still give directions instead of striking it out. The Court of Appeal made the same point in [Shadrack BungeI \(Suing as Administrator of the Estate of Joseph Kipkering- Deceased\) v Selina Jerotich \(Sued as the administrator of the Estate of Mary Jepkosgei Kiswai- Deceased\)](#) Eld CA Civil Appeal No 4 of 2018 [2021] eKLR when the court dealt with the same issue and explained that, “The only issue, we respectfully disagree with the learned Judge, is his finding that an Originating Summons was an unsuitable vehicle to take the dispute to court, since in his view, the dispute was not one envisaged under Order 37 of the [Civil Procedure Rules](#). The truth is that by virtue of that very Order 37 Rule 19 the summons can be converted into a plaint if the circumstances allow.”

16. As to whether the Summons ought to be signed by the Judge in the nature of summons to enter appearance, the court in [Kenya Hotels Ltd v Oriental Commercial Bank Ltd \(Formerly known as The Delphis Bank Limited\)](#) (Supra) answered the questions by stating that, “The answer to this ground is found in the Court’s decision in [Harith Sheth T/A Harit Sheth Advocate v K.H Osmond](#) [2011] eKLR, where it was clarified that this Rule has no application to proceedings brought by originating summons; that the old Order XXXVI sets out the entire procedure for bringing suits by originating summons complete with standard Forms to guide litigants and counsel on how to draw an originating summons; that according to that form the plaintiff or his advocate, and not the judge, is required to sign the originating summons; and that an originating summons being a means of commencing a suit is itself, at the same time a summons to enter appearance.”



17. I therefore decline to strike out the Summons and the accompanying application. The other issues for resolution may require consideration of evidence which may form the basis of the determination whether the court should grant an injunction at this stage. Since the Originating Summons is a suit, Order 40 of the Rules permits an applicant to apply for temporary relief by way of an injunction pending the determination of the suit.
18. In order to succeed in an application for an injunction, a party must demonstrate that it has a prima facie case with a probability of success, demonstrate irreparable injury which cannot be compensated by an award of damages if a temporary injunction is not granted, and if the court is in doubt show that the balance of convenience is in their favour. These three conditions are to be applied as separate, distinct and logical hurdles which the application is expected to surmount sequentially (see *Giella v Cassman Brown* [1973] EA 348 and *Nguruman Limited v Jane Bonde Nielsen and 2 Others* Nrb CA Civil Appeal No 77 of 2012 [2014] eKLR). This means that if the applicant does not establish a prima facie case then irreparable injury and balance of convenience do not require consideration. On the other hand, if a prima facie case is established, then the court will consider the other conditions.
19. As to what constitutes a prima facie case, Zeevi has rightly submitted that the Court of Appeal in *Mrao Ltd v First American Bank of Kenya Limited and 2 Others* [2003] eKLR explained that it is, “...a case in which on the material presented to the Court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party to call for an explanation or rebuttal from the latter.” In this case, Zeevi must establish a case that Esmail, as his trustee, cannot call a general meeting of LDL.
20. Zeevi’s case is that Esmail holds shares in LDL in trust for him and that he cannot act or exercise powers as a shareholder unless authorized by Zeevi. Esmail does not dispute that he was to hold Zeevi’s share in LDL in trust for him, he however states that this express trust was not subject to any limitation or subject to him taking instructions from Zeevi before carrying out his powers as a shareholder of LDL or even his obligation to act as an independent director of LDL. He contended that trusts of shares are, in any event, not recognised by section 119 of the Companies Act (Repealed), then in force, nor are they recognised by section 104 of the Companies Act 2015 which is now applicable.
21. Section 119 of the Companies Act (Repealed) provided that, “No notice of any Trust, expressed, implied or constructive, shall be entered on the register, or be receivable by the registrar.” Section 120 went on to state that “The register of members shall be prima facie evidence of any matters by this Act directed or authorized to be inserted therein.” While I agree with Esmail that trusts in shares were not recognized as such by the Companies Act (Repealed), the court has always maintained that one policy objective of the above sections is that members of the public and any third party dealing with a company must be deemed to deal with the company on the basis of membership of the company as reflected in the registry and will not be required to look beyond the information in the register to find out whether trusts exist and if so their nature. In that sense the two provisions, construed together, protects third parties against claims based on a trust of which they do not have notice. Mativo J,(as he was then) held in *Guo Dong v Multi-Win Trading (EA) Company Ltd & 6 others; Registrar of Companies (Interested Party)* [2020] eKLR as follows:

That said, the provisions of Sections 119 and 120 cannot be read as invalidating a Trust arrangement entered by a registered member with a beneficiary. The Trust arrangement although not enforceable as against a third party who has no knowledge of it or the company remains valid between the parties and is enforceable as between the Trustee and Beneficiary.



The arguments around Sections 119 and 120 of the repealed statute cannot aid the 1st and 2nd Defendants in invalidating the Trust arrangement between them and the Plaintiffs.

22. While Esmail cannot avoid the trust by hiding behind section 119 of the *Companies Act* (Repealed), Zeevi has the onus of establishing that Esmail did not have the power and authority to make decisions as a shareholder without the express authority of Zeevi. There is no written trust deed or instrument between the parties that expressly delimits and circumscribes the rights and powers of Esmail as trustee of Zeevi's shares. Thus, Zeevi relies on statute, more so section 120 of the *Companies Act*, 2015 which provides for, "Exercise of rights if shares held on behalf of others - If a member holds shares in a company on behalf of more than one person" to claim that Esmail's rights and powers were limited as the holder of his shares. However, section 120 above cannot apply to Esmail as he was not holding shares for more than one person. Zeevi further calls in aid section 114(1) and (3)(c) of the *Companies Act*, 2015 which provide as follows:

114. Effect of provisions of articles relating to enjoyment or exercise of rights of members

(1) This section applies to a provision in the articles of a company that enables a member to nominate another person or persons to enjoy or exercise all or any specified rights of the member in relation to the company.

(3) This section applies to the following rights—

a. the right to require directors to call a general meeting;

23. However, Zeevi does not point to any provision in LDL's articles of association which limit a nominee's power to call for a general meeting. This provision therefore cannot also come to Zeevi's aid at this point. I therefore find and hold that Zeevi has not made out a prima facie case at this point that warrants the grant of an injunction against the annual general meeting called by Esmail. No prima facie evidence has been adduced to demonstrate that Esmail acted beyond the powers and rights granted to him as a trustee shareholder in calling for the annual general meeting of LDL. Since Zeevi has not established a prima facie case with a probability of success, the application for an interlocutory injunction must fail.

24. Zeevi also seeks a mandatory injunction directing Esmail to do all necessary acts to effect transfer of share(s) held by him in LDL back to Zeevi and to effect the change of directorship in LDL to Zeevi and his nominees. The general principle governing the grant of an interim mandatory injunction are well established. The Court of Appeal in *Kenya Breweries Limited & Another v Washington O. Okeyo* [2002] eKLR stated that a mandatory injunction can be granted on an interlocutory application as well as at the hearing but should not normally be granted in the absence of special circumstances but that if a case is clear and which the court thinks it ought to be decided at once, a mandatory injunction will be granted at an interlocutory application (see also *Shariff Abdi Hassan v Nadhif Jama Adan* [2006] eKLR).

25. This is not a case that is clear cut thus warranting the intervention of mandatory orders. Zeevi must establish the nature and extent of the trust of shares in light of the defences that have been raised by Esmail. These issues cannot be determined at an interlocutory stage. I therefore decline the entreaty to grant a mandatory injunction.

26. While I decline to strike out the suit, it must now be evident that the application before the court lacks merits. The application 4th December 2022 is dismissed with costs. The interim orders in force are discharged. The matter is adjourned for directions as to hearing.



DATED AND DELIVERED AT NAIROBI THIS 26TH DAY OF JULY 2023.

D. S. MAJANJA

JUDGE

Court Assistant: Mr M. Onyango

Mr Mukuha instructed by Echessa and Bwire Advocates LLP for the Plaintiff

Mr Ochieng Oduol instructed by Tripleoklaw LLP Advocates for the Defendant.

Mr Gathu instructed by Anne Wamithi and Company Advocates for the Interested Party.

