



**Nganga v Adaki & 5 others (Commercial Case E002 of 2023)
[2023] KEHC 26198 (KLR) (Commercial and Tax) (30 November 2023) (Judgment)**

Neutral citation: [2023] KEHC 26198 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E002 OF 2023
JWW MONG'ARE, J
NOVEMBER 30, 2023**

BETWEEN

THOMAS MUNGAI NGANGA PLAINTIFF

AND

PATRICK CHRISTOPHER ADAKI 1ST DEFENDANT

ELIZABETH REBECCA AWOUR 2ND DEFENDANT

LEMUMA APOTHEKE LIMITED 3RD DEFENDANT

VINCENT OWOUR OGOLA 4TH DEFENDANT

MOSES ELVIS OBUHA 5TH DEFENDANT

LEMUMA APOTHEKE PHARMACY LIMITED 6TH DEFENDANT

JUDGMENT

1. The Plaintiff herein, Thomas Mungai Nganga, instituted the suit against the Defendants herein by a plaint dated 27th August 2014 and amended on 25th April 2016 seeking that judgment against the Defendants jointly and severally/ and or singly for:-
 - i. A permanent injunction against the Defendant severally, jointly and or by themselves, their servants or agents from restraining the defendants their agents, and proxies from fraudulently, un-procedurally and illegally transferring the Plaintiff's shares in the company.
 - ii. A permanent injunction restraining the Defendants herein from closing down and/ or interfering in any manner with the business operations and proper functioning of the said company.



- iii. A permanent injunction restraining the Defendants from wasting away, selling, and mortgaging the property of the company and preventing any dealings in the company's bank accounts being account nos. xxxx and xxxx held at CFC bank and xxxx and xxxx held at Barclays bank.
 - iv. General damages.
 - v. costs and interests.
 - vi. Any other relief that the Honourable court will deem fit and just to grant.
2. The Plaintiff avers that on or about June 2014, the Defendants purportedly and fraudulently drafted a couple of documents, stating that the Plaintiff had resigned from Lemuma Apotheke Limited and transferred his shares to the Defendants. On or about July 2014, the 1st, 2nd and 3rd Defendants locked the Business premises and fired all the staff and employees of the 3rd Defendant. The 1st, and 2nd Defendant fraudulently formed a company known as Lemuma Apotheke Pharmacy Limited with the 4th and 5th Defendant as the new directors.
 3. The Plaintiff alleged that the Defendants orchestrated a fraudulent scheme to force him out of the Company by first and foremost drafting his resignation letter for the Plaintiff, an acceptance of shares, Declaration Letters, and an affidavit on behalf of the Plaintiff that he had ceased being a director of the 3rd Defendant and locking the business.
 4. According to Plaintiff the actions of the Defendants paralyzed the operations of the 3rd Defendant, the Defendants violated the company's memorandum and articles of Association.
 5. Upon service of the plaint and summons to enter Appearance, the firm of Kerongo & Company Advocates first filed a Memorandum of Appearance dated 15th November 2016 for the 1st, 2nd and 3rd Defendants, denying the averments of the plaint while agreeing that the 3rd Defendant was unable to meet its financial obligation and was shut down. They denied the particulars of fraud, they claim that the Plaintiff was invited to the company for purposes of compliance with the *Pharmacy and Poisons Act*, and the terms of the Plaintiff's employment were spelt out and did not involve any part in the management of the 3rd Defendant or sharing of profit.
 6. The Defendants allege that shares allocated to the Plaintiff were and have never been paid for and thus the Plaintiff cannot claim to be part of the decision-making organ of the 3rd Defendant. That the Plaintiff's services were terminated by the 3rd Defendant after it was discovered he fraudulently manipulated the system and pocketed cash resulting in the 3rd Defendant failing into financial crisis. The 1st, 2nd and 3rd Defendants deny having any relationship with the 4th, 5th and 6th Defendant.
 7. Subsequently, after Plaintiff successfully enjoined the 4th, 5th and 6th Defendant to the suit the same firm of Kerongo & Company Advocates filed a Memorandum of Appearance dated 3rd August 2016 on behalf of the 4th, 5th and 6th Defendants and filed their defense dated 16th August 2016, denying the particulars of fraud itemized in paragraph 10th of the Plaint, they aver there were no good reasons for the Plaintiff to sue the directors of the 6th Defendant. The 6th Defendant purchased the Pharmacy business from the 3rd Defendant. The 3rd Defendant had collapsed and was on the verge of winding up.
 8. At the close of pleadings, on 16th October 2023, the matter proceeded for hearing with the Plaintiff calling one witness, Thomas Mungai who testified he lives at Utawala and works for the County Government of Kiambu. He adopted his witness statement dated 27th October 2017, and the list of documents dated 26th April 2023. He told the court he is a director of the 3rd Defendant and has never resigned from the directorship. He became a director in 2010 and held 510 shares. He had no



documentation to show as he left them in the office when he was chased by goons. He denies having sworn an affidavit or a letter for the transfer of shares.

9. In cross-examination by Mr. Kerongo, he stated he became a director and shareholder of the company in 2010 and was admitted to the company and held 510 shares, He has no document to show he held 510 shares as he left everything in the company. He told the court he was not to pay for the shares allocated to him. He said the 6th Defendant is a different company registered by the 4th and 5th Defendants he had no evidence to show that the 4th and 5th Defendant were working for the 3rd Defendant.
10. At the close of the Plaintiff's case, the Defendants did not call any witness and instead closed its case. The court therefore directed the parties to file written submissions but the parties failed to comply with the orders.

Analysis and Determination

11. I have considered the pleadings filed by both parties, and the oral evidence adduced by the plaintiff, and I note that the only issue for determination is "whether the Plaintiff has established his case to the required standard to warrant the grant of the orders sought."
12. From the pleadings, the Plaintiff seeks the court a grant of injunctive reliefs against the defendants herein. It is trite law that an injunctive relief determines the rights of the parties before the court, and is usually granted on the merit of the case. A permanent injunction restrains the defendant from committing a certain act.
13. In *Nguruman Limited v Jan Bonde Nielsen & 2 others*, CA no 77 of 2012; [2014] eKLR, the Court of Appeal reiterated the conditions to be met by a litigant who seeks injunctive relief as follows: "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.
14. The court will determine if the Plaintiff has established a prima facie case, and whether if his shares in the 3rd Defendant Company are transferred he will suffer irreparable loss.
15. According to the Plaintiff he jointly with the 1st and 2nd Defendant formed the 3rd Defendant Lemuma Apotheke Limited where he was allocated 510 shares with the 1st and 2nd Defendant allocated 1 share each as per the attached CR12 for July 2013, and 5th May 2015. He avers he was sometimes in July 2014 kicked out of the Company and in an attempt to defeat the interest of justice the 1st and 2nd Defendants formed the 6th Defendant herein; the 6th Defendant has been ordering goods in the name of the 3rd Defendant Company which is illegal and fraudulent. He attached copies of invoices evidencing the same. The Plaintiff argues that the necessary documents to prove that there was an agreement were left in the company and he can't procure the same.
16. On the other hand, the Defendants deny that the Plaintiff was a director as well as a shareholder of the company; they maintain that he was contracted for the sole purpose of compliance with the *Pharmacy and Poisons Act*, and he was sacked from the company for tempering with the accounts and stealing from the company. They aver the 510 shares allocated to the Plaintiff were never paid up and therefore the Plaintiff cannot claim any shares in the company.



17. It is a well-established law that whosoever asserts a fact is under an obligation to prove it to succeed. Section 107 (1) (2) of the Evidence Act provides as follows:-
- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
 - (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
18. The Plaintiff, in this case, has adduced copies of CR 12 showing he was a director of the 3rd Defendant Company with 510 shares, the burden, therefore, shifts to the Defendant to prove the contrary. Defendant only asserts that Plaintiff was an investor but no evidence has been adduced to prove the same.
19. The Plaintiff has also alleged fraud against the Defendants. It is trite that the allegations of Fraud must strictly be proved. The Plaintiff has attached a letter dated 24th June 2014, with the ref Acceptance offer share offer and the declaration signed by the 4th and 5th Defendant accepting the 510 shares belonging to the Plaintiff the same has not to be signed by the Plaintiff, he also attached an affidavit purportedly sworn by him in July 2014 ceasing to be a director of the 3rd Defendant and transferring his shares to the 4th and 5th Defendant herein in equal shares, and a resignation letter dated 11th June 2014 purposely signed by him resigning as a director of the 3rd Defendant.
20. The Defendants did not call any witnesses to challenge the allegations of fraud by Plaintiff, they did not also call any witnesses to shed light on the transfer and the operations of the company, the assertion by Plaintiff therefore remains unchallenged. However, it is not clear to the court what kind of contractual arrangement existed between the Plaintiff and the 1st and 2nd Defendants in the formation of the 3rd Defendant Company. What is clear is the CR12 adduced by Plaintiff indicates the Plaintiff is a director with a shareholding of 510 shares while the 1st and 2nd Defendant had a shareholding of 1 share each.
21. Going by the above CR12 this court does not doubt the Plaintiff that he was a director of the 3rd Defendant, the Plaintiff has also denied executing any document for transfer of shares of resignation from the company. The defendants have not availed evidence to rebut the said assertion by the Plaintiff. In the circumstances, I do not doubt that the Plaintiff has proved his case against the defendants on a balance of probability.
22. I have no reason to deny the Plaintiff the orders sought. In the upshot, this court will grant the following orders:-
- i. An order of permanent injunction restraining the Defendants from fraudulently, un-procedurally and illegally transferring the Plaintiff's shares in the company.
 - ii. An order of permanent injunction to restrain the Defendants from closing down and/ or interfering in any manner with the business operations of the 3rd Defendant.
 - iii. An order restraining the Defendants from wasting away, selling, and mortgaging the property of the 3rd Defendant and preventing any dealings in the company's bank accounts being account nos. xxxx and xxxx held at CFC bank and xxxx and xxxx held at Barclays bank.
 - iv. Costs of the suit together with interest thereon.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 30TH DAY OF NOVEMBER, 2023.



J.W.W. MONG'ARE

JUDGE

In the Presence of:-

- 1.No appearance for the Plaintiff.
- 2.No appearance or the Defendant.
- 3.Amos - Court Assistant

