



**Malde & another v Karoki & 2 others (Civil Case E384 of 2023)  
[2023] KEHC 26533 (KLR) (Commercial and Tax) (18 December 2023) (Ruling)**

Neutral citation: [2023] KEHC 26533 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL CASE E384 OF 2023  
A MABEYA, J  
DECEMBER 18, 2023**

**BETWEEN**

**PRATIK MANSUKHLAL MALDE ..... 1<sup>ST</sup> PLAINTIFF**

**ANIL KUMAR VIRPAR MALDE ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**RAHAB MWIHAKI KAROKI ..... 1<sup>ST</sup> DEFENDANT**

**FAMILY SIGNATURE LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**KENYA REVENUE AUTHORITY ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. This a Motion on Notice dated 22/8/2023 by the plaintiffs. It is brought under sections 1A, 1B, 3 and 3A of the *Civil Procedure Act* and order 40 rule 2 of the *Civil Procedure Rules*. It sought to restrain the 3<sup>rd</sup> defendant from implementing or enforcing the Departure Prohibition Order dated 14/1/2021 made against the plaintiffs.
2. There were also other prayers including a restraint on the 3<sup>rd</sup> defendant from enforcing measures against the plaintiffs on taxes owed by the 2<sup>nd</sup> defendant.
3. The motion was supported by the affidavit of Patrik Mansukhlal Malde sworn on 22/8/2023. The grounds were that; the plaintiffs and the 1<sup>st</sup> defendant had been in various joint businesses between 2006 and 2012. One such business was the 2<sup>nd</sup> defendant wherein the plaintiffs disengaged on 30/4/2012 by resigning as directors and transferred all their shares to the 1<sup>st</sup> defendant.
4. In 2015, the 3<sup>rd</sup> defendant commenced investigations on the 2<sup>nd</sup> defendant's tax affairs. The 3<sup>rd</sup> defendant did not involve the plaintiffs in those investigations as the 1<sup>st</sup> defendant properly indicated



- that they were no longer directors or shareholders of the 2<sup>nd</sup> defendant. Come 14/1/2021, the 3<sup>rd</sup> defendant caused to be issued the Departure Prohibition Orders against the plaintiffs due to a tax demand against the 2<sup>nd</sup> defendant that had not been settled. That as at that time, the plaintiffs were neither directors nor shareholders of the 2<sup>nd</sup> defendant.
5. The plaintiffs blamed the 1<sup>st</sup> and 2<sup>nd</sup> defendant from their woes for failing to effect change of particulars at the Companies Registry. That the said Departure Prohibition Order had affected the plaintiffs as they cannot move out of the geographical boundaries of Kenya. That the 3<sup>rd</sup> defendant had used the most punitive method of tax enforcement yet there were other better methods such as attachment of rental income. They prayed that the orders be granted.
  6. The 3<sup>rd</sup> defendant opposed the application through the affidavit of Victor Mino sworn on 11/9/2023. He averred that an additional tax assessment was issued to the 2<sup>nd</sup> defendant on 17/12/2016 for Kshs. 196,584,686/=. Its objection and appeals against the same had been dismissed by both the Tax Appeals Tribunal and the High Court. That there is outstanding taxes of Kshs. 368,848,287/= from the 2<sup>nd</sup> defendant. That demands to settle the same had fallen on deaf ears forcing the 3<sup>rd</sup> defendant to resort to enforcement measures.
  7. It was contended that the Deportation Order was therefore properly issued. That there was no prove that the plaintiffs had effected the transfer of their shares in the 2<sup>nd</sup> defendant. That the 3<sup>rd</sup> defendant was prepared to partially lift the Departure Prohibition Order upon provision of security. That the Constitutional Court had confirmed that the said Departure Prohibition Order was lawful in its judgment of 23/2/2023. That the issue was now pending in the Court of Appeal in C.A No. E 254 of 2023. That since the challenge of the Departure Prohibition Order was active in the Court of Appeal, this Court lacks jurisdiction to entertain the application and suit.
  8. In addition to the replying affidavit, the 3<sup>rd</sup> respondent filed a Preliminary Objection dated 30/8/2023. It contended that the matter is res judicata.
  9. The plaintiffs filed a further affidavit sworn on 18/9/2023. It was averred that the 3<sup>rd</sup> defendant had in the past accepted AmberHouse as Security and allowed the plaintiffs to travel outside the country. That it was wrong that the order was only issued against the plaintiffs and not all the 4 directors of the 2<sup>nd</sup> defendant.
  10. I have considered the respective parties' contestations and the submissions dated 18/9/2023.
  11. This is an application for injunction. The principles applicable are well known as settled in the case of *Giella v Cassman Brown* [1973] EA. These are that an applicant must establish a *prima facie* case with a probability of success, that he must show that he will suffer irreparable loss and damage if the injunction is not granted and if in doubt, the court will determine the matter on a balance of convenience.
  12. Before determining the application, the defendant did raise a preliminary objection. In my view, the preliminary objection satisfies all the tenets of the case of *Mukisa Biscuits Manufacturing Co. Ltd vs West End Distributors Ltd* [1969] EA 696.
  13. In the present case, the preliminary point of law is that the matter is res-judicata having been determined in Constitutional Petition No. E 041 of 2021 between the plaintiffs and the 3<sup>rd</sup> defendant. That the issue of the legality of the Departure Prohibition Orders is still live in the Court of Appeal vide CA No. E 254 of 2023.



14. The doctrine of *res-judicata* prohibits a court from a matter where same issues have been determined by another Court of competent jurisdiction. The same is encompassed in our section 7 of the [Civil Procedure Act](#).
15. It is not disputed that the issue of the legality or otherwise of the Departure Prohibition Orders was an issue that was raised in the said Constitution Petition No. E 041 of 2021. The Constitutional Court determined the matter in favour of the defendant and found the challenge of the said orders to be unmeritorious. The plaintiffs appealed against the said orders and an appeal is pending in the Court of Appeal in CA No. E 254 of 2023. I find that the issue of the legality or otherwise of the impugned Departure Prohibition Orders was raised and determined in the said Constitutional Petition. It cannot be raised in these proceedings. It is *res-judicata*.
16. Even if it were to be argued that all the issues raised in these proceedings were not raised in that constitutional petition, still the doctrine of *res-judicata* would apply under explanation (4) to section 7 of the [Civil Procedure Act](#). The same provides: -

“ Any matter which might and ought to have been made a ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such a suit.”
17. Accordingly, I hold that the matter is *res-judicata*.
18. In any event, since the issue of the legality or otherwise of the said Departure Prohibition Orders is still live in the Court of Appeal *vide* CA No. E 254 of 2023, this Court is bound by the doctrine of *sub-judice* and therefore barred from considering the same.
19. In view of the foregoing, I find that this Court lacks jurisdiction to entertain the matter by dint of *res-judicata*. Accordingly, the application dated 22/8/2023 is without merit and is struck out with costs.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 18<sup>TH</sup> DAY OF DECEMBER, 2023.**

**A. MABEYA, FCI ARB**

**JUDGE**

