



REPUBLIC OF KENYA



**Exclusive Living East Africa Limited & another v Bulimu (Civil Case E453 of 2020)
[2022] KEHC 3159 (KLR) (Commercial and Tax) (19 May 2022) (Ruling)**

Neutral citation: [2022] KEHC 3159 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE E453 OF 2020
WA OKWANY, J
MAY 19, 2022**

BETWEEN

EXCLUSIVE LIVING EAST AFRICA LIMITED 1ST PLAINTIFF

MARC OLIVER STRACK 2ND PLAINTIFF

AND

ANN MIDEVA BULIMU DEFENDANT

RULING

Introduction

1. The plaintiffs herein sued the defendant through the plaint dated 3rd November 2022 seeking the following orders: -
 - i. An order of permanent injunction be and is hereby issued restraining the defendant by herself, agents, servants or otherwise howsoever from masquerading as a director, shareholder and or representative of the 1st plaintiff.
 - ii. Mandatory injunction be and is hereby issued compelling the defendant to surrender all company assets in her possession, which she had acquired and or disposed of in order to preserve the subject of the suit.
 - iii. Mandatory injunction, be and is hereby issued compelling the defendant to produce all the documents relating to the management of the 1st plaintiff in order preserved the subject of the suit.
 - iv. Mandatory injunction be and is hereby issued compelling the defendant to produce the total inventory of the property which were and which originally were in the name of the company.



- v. An order of temporary mandatory injunction be and is hereby issued compelling the Defendant, her sister, Nancy Alivitsa Bulimu and her husband Philip Oyoo to give up possession of the plaintiffs' units which they are occupying at the plaintiffs' premises known as Rivulet residences situate on L.R. No. XXX/XXXX/XX.
 - vi. The tenants and or all purchasers of units at the Plaintiffs premises known as Rivulet residences situate on LR NO. 209/2389/16; be and are hereby ordered to forthwith make all payments whether for rent at the said premises or purchase of units at the said premises to the company's account at SBM Bank, Village Market Branch Account Number 00320XXXXXX.
2. A summary of the plaintiffs' case is as follows: -
1. That 1st plaintiff is suffering loses in tune of millions per month through diversion of rents and payments made by tenants/purchasers of Rivulet Apartments which is the 1st plaintiffs property and the directors/shareholders have been servicing construction loans through their personal earnings and the company's assets risks being sold off any time due to pending payments.
 2. That the Plaintiff is repaying loans for construction of the Apartments yet they are not collecting any monies from the apartment due to diversion of rents/sales of the apartments to personal use by the Defendant who has no legal or equitable right to the company, but has succeeded in the same by use of police to threaten the life of the 2nd Plaintiff who is the managing director and his partner both of who are directors of the 1 Plaintiff and now the company is completely unable to repay the same and its assets have been converted by the Respondent to her use making it difficult for the company to repay the loans and risks corporate veil being lifted against the directors for they are imputing Respondent's actions upon the directors.
 3. That the 1st Plaintiff is not only losing money due to diversion of rents but also to court cases by tenants manhandled and others evicted unprocedurally from the apartments by the Respondent.
 4. That the 2nd Plaintiff is unable to access the apartments to rectify rent payment details, get details of all occupants for issuance of tenancy/lease agreements and address issues raised by occupants and prospective buyers of the apartments due to hostility and harassment by the Respondent and her relatives who she dished out apartments to help her embolden her control of the apartments.
 5. Plaintiff by the 2nd Plaintiff and his partner Alexander Joch who are the directors and shareholders of the 1st Plaintiff.
 6. That the 2nd Plaintiff who is a director and shareholder with the 1st Plaintiff has completely been denied access to the apartments and even threatened with violence severally by the Respondent and her relatives making it impossible for him to access the apartments to correct rent payment anomalies and address issues raised by tenants and prospective buyers of the apartments.
 7. That the Respondent has masqueraded to the tenants that she is a director with the 1st Plaintiff clearly misrepresenting facts to the tenants who are not aware of the true status of facts hence their compliance in paying rent to her directly in cash or Mpesa or to different accounts.
 8. That the Respondent is neither a director nor a shareholder nor an employee nor an agent of the company to warrant her to collect rent or evict tenants or sale the apartments or access



the company's assets but she has used police to threaten the company's directors for her to unlawfully deprive the company of rent collection and its property, which matters have been reported to the police.

3. Concurrently with the plaint, the plaintiffs filed the application dated 3rd November 2020 (hereinafter “the 1st Application”) seeking the same injunctive orders sought in the plaint, on an interim basis, pending the hearing and determination of the suit.
4. The application is supported by the 2nd plaintiff's affidavit of and is premised on the grounds that: -
 - i. The defendant, without any iota of right, has illegally and unlawfully converted and re-channeled the plaintiff's funds to other unknown destinations ostensibly to defraud the plaintiff of the said funds.
 - ii. The defendant who has never been a shareholder and or director to the plaintiff has unlawfully converted totally all assets both movable and permanent of the company without any colour of right, and without authority from the company and its board of directors.
 - iii. The defendant has been on a spree of disposing of the company's assets to unknown third parties without any authority or legal right.
 - iv. The defendant has unlawfully denied the plaintiff access to the offices of the company and to any other properties belonging to the company.
 - v. The defendant has been masquerading unlawfully as a director of the 1st plaintiff and has created havoc to the business and property of the company.
 - vi. The defendant has rendered the 2nd plaintiff poverty stricken with no means of adequate livelihood.
 - vii. The defendant has destroyed all the businesses of the 1st plaintiff and made it impossible for the company to earn any income.
 - viii. The registrar of companies has confirmed that he has reversed the fraudulent activities of the defendant whereby she had caused to be changed valid directorship and shareholdings in the company and interfered with the quantities of the shareholding and shares in the company.
 - ix. The defendant has unlawfully converted all the assets and documents relating to the company and put them in her custody.
 - x. It is in the interest of justice and fairness that the orders sought herein are granted.
5. The defendant opposed the application through her replying affidavit dated 8th December 2020 wherein she states that the application contravenes the provisions of Section 238 of the *Companies Act*. She avers that she was a Director of the 1st plaintiff company but that her objection to the 2nd Plaintiff's fraudulent dealings in the Company's bank accounts triggered her removal as Director. She adds that the instant application is aimed at circumventing ongoing cases between her and the 2nd plaintiff before other courts.
6. The defendant also filed Grounds of Opposition to the application and plaint wherein she sets out the following grounds: -
 - i. The fore said (sic) application and the suit in its entirety, neither discloses the underlying relationship between the 2nd Plaintiff and the Defendant herein nor does it disclose the existence of the Family Division matrimonial cause vide O.S 1 3 of 2020 (in which the 2nd



Plaintiffs shares in the 1st Plaintiff are the subject matter of the said suit)which is coming up for hearing before the Hon Justice Muchelule on the 4th of February 2021.

- ii. The fore stated (sic) application is grounded on a gross misrepresentation of facts, material non-disclosure, suppression of material facts, contradictory averments and thus it ought to be struck out.
 - iii. The fore said (sic) application is based on innuendo and hearsay thus lacking in both facts and substance.
 - iv. The Application is fatally defective as it seeks for orders as against parties that are not enjoined in the suit.
 - v. The grounds and issues as pleaded in this application are so obfuscated that can't warrant the issuance of a mandatory injunctive order.
 - vi. The said application is all hot air as the same is not backed by an iota of evidence.
7. Ms, Alice N. Kamau Advocate filed a replying affidavit to 1st application wherein she states that she acted for the 2nd plaintiff and the defendant in respect to the suit property. She adds that she knew the 2nd plaintiff and defendant as husband and wife. She further states that she coordinated all transactions and litigation matters concerning the 1st plaintiff and that she prepared the Annual Returns, Increase of Nominal Capital, Return on Allotments and Change of Particulars of the Company. She further states that the 1st defendant effected changes in the directorship of the company wherein the 2nd plaintiff and defendant were named as co-directors and that they always visited her office together.
8. She avers that her working relationship with the 1st plaintiff still continues but that there have been differences between the 2nd Plaintiff and the Defendant.
9. The defendant filed the application dated 22nd September 2021 (hereinafter "the 2nd Application") seeking the following orders: -
- 1) Spent.
 - 2) Spent.
 - 3) There be a stay of execution and any further purported implementation of the ruling of the registrar of companies dated 28th July 2020 pending hearing and determination of this application.
 - 4) An interim Order be and is hereby issued restraining the 1st and 2nd Plaintiff/ Respondent herein by themselves and or through; their assigns, their appointees, their nominees and or their agents from breaching the peace and tranquility, from breaking and entering and/or from in any other means) interfering with the peaceful and quiet occupation of the tenants at the at the Rivulet Residences pending hearing and determination of this application.
 - 5) There be a stay of execution and any further purported implementation of the rulings of the registrar of companies dated 28th July 2020 pending the hearing and determination of the suit.
 - 6) Costs of this application be provided for.
 - 7) Such further and/or orders be made as the court may deem fit and expedient.
10. The application is supported by the defendant's affidavit and is based on the following grounds: -



- 1) The 2nd Plaintiff/ respondent without any Colour of right on the 28th of August 2021, 13th of September 2021 and 17th of September 2021 stormed into the suit premises in the company of armed policemen and unknown goons confronted tenants in their respective houses, issued them with notices, verbally warned them of dire consequences if they did not abide by his notices, caused fracas and thereby denied the tenants therein their right to a peaceful and quiet environment in the name of enforcing the decision of the registrar and in purport of collecting the rent from the tenants.
- 2) Needless to point out that the issue of rent collection is an issue that is pending determination both in the Plaintiffs/ Respondents substantive suit and in its pending application dated 3rd November 2020.
- 3) That this court had made it clear to the Plaintiff/ Respondents advocates on the 18th November 2020 and on the 17th December 2020 that issue of collection of rent could not be dealt with in the interim as had been sought then by the Plaintiffs/ Respondents Advocates
- 4) That despite the fact that the Plaintiff/ Respondent herein is and was aware of this position of this court the 2nd Plaintiff/ Respondent herein without any Colour of right and or backing of a court order on the fore stated dates stormed the suit premises with armed policemen and goons to purportedly collect rent from the few tenants in the premises.
- 5) That the said 2nd Plaintiff/ Respondent has ostensibly made it clear to the police and the tenants that his impugned actions at the suit premises are backed by the impugned decision of the Registrar of the 20th July 2020 which purported to remove the Defendant/ Applicant herein from the directorship of the 15th Plaintiff / Respondent.
- 6) The impugned actions of the 2nd Plaintiff/ Respondent herein are contrary to the proceedings that are before court, are prejudicial and are preemptive of the issues pending before court for trial.
- 7) That suffice to note that the legality of the ruling delivered by the registrar of companies on the 28th of July 2020 has been challenged by the Defendant herein in its counterclaim.
- 8) That it would be prejudicial for the 2nd Plaintiff/ Respondent to purport to be enforcing the same ruling dated 28th July 2020 whereas the court has not made a determination on whether to affirm the same or to dismiss the same.
- 9) That 2nd Plaintiff/ Respondent herein further in his bid to scuttle the proceedings herein he has purportedly dismissed the advocate, Ms. Alice Kamau, for the 1st Plaintiff/ respondent who effected the changes in the directorship that disputed at the registrar of companies and which culminated in the impugned ruling of the registrar dated 28th July 2020.
- 10) That the said 2nd Plaintiff/ Respondent has emailed and further physically visited the offices of the said Advocate seeking to take possession of all the files belonging to the company including which includes the instructions he issued to the fore said advocate to make changes in the directorship of the Plaintiff company and which very changes he later contested.
- 11) Suffice to note that the said advocate has deposed before this court that she was instructed by the 2nd Plaintiff/ Respondent herein to affect the fore said changes and which evidence is therefore germane in determining the legality of the registrar's ruling dated 28th July 2020.



- 12) That from the conduct of the 2nd Plaintiff/ Respondent it is obvious that he is working ahead of time with the intention of scuttling the proceedings before court if not, then he intends to stifle any witnesses that would be central to presentation to the court all the issues surrounding the dispute between the directors of the 1st Plaintiff/ Respondent.
 - 13) The rights of parties will not be prejudiced by the orders sought herein.
 - 14) This Application has been brought without unreasonable delay.
11. The defendant also objected to the 1st Application and the Plaintiff through the Notice of Preliminary Objection (PO) dated 17th November 2020 wherein she listed the following grounds: -
1. That the 2nd Plaintiff who is a director of the 1st Plaintiff company lacks the capacity to institute and or co prosecute the instant suit and, on that ground, alone this suit ought to be struck of for misjoinder of parties.
 2. That the 2nd Plaintiff who is a director of the 1st plaintiff herein has purported to institute a derivative action on his own and/or on behalf of the 1st Plaintiff herein whereas he has not acquired the requisite leave of court.
 3. That the Application and the suit as drawn and pleaded lacks clarity on who the Plaintiff is and their ability to co prosecute this application and the suit. It thus follows that the application and the suit in their entirety are bad in law, are an abuse of court process and ought to be struck out.
12. Parties canvassed both the applications and the Preliminary Objection by way of written submissions. I will consider the preliminary objection first as its outcome will have a bearing on the two applications.
13. What constitutes a Preliminary Objection was discussed in *Mukisa Biscuit Manufacturing Company Ltd vs West End Distributors Ltd* [1969] EA 696 as follows: -
- “...so far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit....
- A preliminary objection is in the nature of what used to be a demurer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is an exercise of judicial discretion.”
14. The Preliminary Objection is in respect to the competence of the suit. According to the defendant, the plaintiff does not comply with the provisions of section 238 of the *Companies Act*. The defendant submitted that the 2nd plaintiff did not establish that his personal claim was aligned to those of the 1st plaintiff so as to justify his joinder to the suit in his individual capacity.
15. Section 238 of the *Companies Act* 2015 provides that:-
- “(1) In this Part, “derivative claim” means proceedings by a member of a company
-
- (a) in respect of a cause of action vested in the company; and
 - (b) seeking relief on behalf of the company.



- (2) A derivative claim may be brought only—
 - (a) under this Part; or
 - (b) in accordance with an order of the Court in proceedings for protection of members against unfair prejudice brought under this Act.
- (3) A derivative claim under this Part may be brought only in respect of a cause of action arising from an actual or proposed act or omission involving negligence, default, breach of duty or breach of trust by a director of the company.
- (4) A derivative claim may be brought against the director or another person, or both.
- (5) It is immaterial whether the cause of action arose before or after the person seeking to bring or continue the derivative claim became a member of the company.
- (6) For the purposes of this Part—
 - (a) “director” includes a former director;
 - (b) a reference to a member of a company includes a person who is not a member but to whom shares in the company have been transferred or transmitted by operation of law.”

16. From the above provision, it is clear that for a party to succeed in a derivation action, he or she must demonstrate the following: -
- a) He or she must be a member of the company and includes a person who is not a member but to whom shares in the company have been transferred or transmitted by operation of law;
 - b) The proceedings must be in respect of a cause of action vested in the company;
 - c) The proceedings must be seeking relief on behalf of the company;
 - d) The proceedings must be for protection of members against unfair prejudice brought under the *Companies Act*.
 - e) The proceedings are in respect of a cause of action arising from an actual or proposed act or omission involving negligence, default, breach of duty or breach of trust by a director of the company;
17. A derivative suit is ordinarily brought by a minority shareholder on behalf of the company. The instant suit was however instituted by the company and the 2nd plaintiff who is a director of the Company. I find that, strictly speaking, this case does not qualify to be a derivative suit that requires leave of the court before its filing as the company is in a position to sue or be sued in its own name.
18. Consequently, I find defendant’s preliminary objection dated September 17, 2020 lacks merit and it hereby struck out with costs to the plaintiff.
19. Turning to the applications dated September 22, 2021 and November 3, 2020, I note that both the plaintiffs and the defendant seek similar orders of injunction over the same subject matter. I will therefore consider the applications together.



20. The principles governing the granting of orders of injunction were set out in the case of *Giella vs Cassman Brown Co. Ltd* 1973 E.A. 358. Similarly, in the case of *Nguraman Limited vs Jan Bonde Nielsen & 2 Others* [2014] eKLR the Court of Appeal held that: -

“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.”

21. Prima facie case was described in the case of *Mrao Ltd vs First American Bank of Kenya Ltd & 2 Others* (2003) KLR 125 as follows:-

“So what is a prima facie case.....In civil cases it is a case which on the material presented to the court or a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation on rebuttal from the latter.”

22. In this instant case, the plaintiffs seek orders to restrain the defendant from masquerading as a director/ shareholder/representative of the 1st plaintiff company and a mandatory injunction to compel the defendant to surrender all the plaintiffs’ assets. The plaintiffs further seek orders for the payment of rent from the suit premises into a joint interest earning account or in court, and an order to compel the defendant and her relatives to give up possession of the plaintiffs’ residential premises.
23. The defendant’s application on the other hand seeks to restrain the 2nd plaintiff from entering into the suit premises and an order staying the implementation of the decision of the Registrar of Companies.
24. It is apparent that the dispute between the parties herein concerns the management of the 1st plaintiff’s Company. It was not disputed that the 2nd Plaintiff and the defendant were husband and wife respectively and co-directors of the Company. It was also not disputed that the instant case started as a matrimonial dispute before it snowballed into wrangles over the directorship and shareholding of the Company. According to the defendant, the instant case is aimed at circumventing pending cases before the family court.
25. The plaintiffs contend that the defendant is not a director or shareholder of the Company while the defendant maintains that she appealed against the decision, by the Registrar of Companies, to remove her from the position of Director. Through the 2nd application, the defendant seeks to stay the Registrar’s said decision.
26. As I have already stated in this ruling, the orders sought in the plaint are the same as the orders sought in the 1st application. I therefore find that granting the orders sought in the 1st application, at this interlocutory stage, will be tantamount to making final orders on the main suit without analyzing the evidence to be presented by the parties at the hearing.



27. Turning to the 2nd application, I note that the defendant filed a defence and counterclaim to the plaint that raises critical issues regarding the management of the 1st plaintiff company that can only be unpacked at the hearing of the main suit. Regarding the prayer for stay of the Registrar of Companies decision on the directorship of the Company, I find that the said decision would be best dealt with at the hearing of the main suit.
28. I also note the parties' concern over the rent money from the suit premises and their prayer that the same be preserved pending the hearing and determination of the suit. I find that at the center of the dispute herein is the subject of rent money. My finding is that the contest over the said rent money can best be dealt with through an order to preserve the subject matter of the suit. In this regard, the court is mindful to protect the rights of both parties. The issue in contention concerns the management and control of the 1st Plaintiff. It will therefore be just and fair that the rental income from the suit premises be deposited in a joint interest earning account in the names of the advocates of the parties.
29. In conclusion, I find that the most appropriate order to make in the circumstances of this case is to preserve the rent income from the suit premises. I therefore make the following final orders: -
1. That all rental income from the structures on the suit premises shall henceforth be deposited in a joint interest earning account with a bank of repute to be held in the names of the advocates for both parties. For clarity purposes, the said joint account shall be in the names of Ms Gedion Nakhone & Associates Advocates and Okoth & Co. Advocates.
 2. Costs of the application shall be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 19TH DAY OF MAY 2022.

W. A. OKWANY

JUDGE

In the presence of:-

Ms Mwende for Okoth for Applicant/Plaintiff.

Ms Kitenge for Okoth for Plaintiff/Applicant.

Mr Nakhone for Defendant

Court Assistant- Sylvia

