



REPUBLIC OF KENYA



**Mecano Projects Limited v Muchungu (Civil Suit E974 of 2021)
[2022] KEHC 14594 (KLR) (Commercial and Tax) (28 October 2022) (Ruling)**

Neutral citation: [2022] KEHC 14594 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT E974 OF 2021
A MABEYA, J
OCTOBER 28, 2022**

BETWEEN

MECANO PROJECTS LIMITED PLAINTIFF

AND

JAMES NDIWGA MUCHUNGU DEFENDANT

RULING

1. Before court is an application dated December 17, 2021. It was brought under sections 1A, 1B & 3A of the *Civil Procedure Act* 2010, order 40 rule 1 and order 51 rule 1 of the *Civil Procedure Rules, 2010*, & sections 140, 142, 143 and 145 of the *Companies Act* No 17 of 2015.
2. The application sought orders for a temporary injunction to restrain the defendant and all its agents from selling or interfering with any of the plaintiff's properties and conducting any business on behalf of the company pending the determination of the suit.
3. The grounds thereof were set out on the face of the motion and in the supporting affidavit of Eduardo Hernandez Ciriza sworn on December 17, 2021. It was averred that the plaintiff was in the business of investing in real estate properties and the defendant was one of its six directors.
4. The plaintiff alleged that it did a search on December 15, 2021 on two of its properties in Embu being Mbeti/Kamuringa/3491 and Mbeti/Kiamuringa/4477 and discovered that the defendant had fraudulently subdivided Mbeti/Kamuringa/3491 without the plaintiff's authority. The plaintiff's CR-12 dated December 8, 2021 and the search certificates were produced as EHC-1 and 2, respectively.
5. It was further alleged that on December 8, 2021, the plaintiff discovered that the defendant was in the process of selling the plaintiff's property located in Dagoretti being LR No Dagoretti/Thogoto 3841, 3842, and 3843. He was also carrying developments on the plaintiff's parcels. That *vide* letters dated



- September 13, 2017 and October 4, 2017, the defendant transferred shares in the plaintiff company in exchange of four plots without the plaintiff's authority.
6. It was thus contended that the defendant had taken possession of the plaintiff's properties as his own without authority and that the present application had been brought in support of the application before the Registrar of Lands to register a caution against the said properties. The plaintiff was at risk of incurring more financial loss unless the orders sought herein were granted.
 7. The respondent opposed the application *vide* his replying affidavit sworn on February 10, 2022. He averred that the title documents for LR No Mbeti/Kamuringa/3491 and Mbeti/Kamuringa/4477 were not in his possession but in the possession of Meridian Acceptance Limited Muthangari Branch, a sister company to the plaintiff. That access to the properties had been denied by court order in HCCOMM/E743/2021 Meridian Acceptance Limited v James Ndwiga Muchungu.
 8. That the alleged subdivision was done after a resolution of all company directors/shareholders and the process was commenced but not completed as the company was inoperative. It was thus contended that the subdivision was made in full knowledge of the plaintiff and the titles were in its name following an agreement between the defendant and plaintiff directors to have the properties divided and increase their value.
 9. The defendant further contended that the dagoretti properties, LR No Dagoretti/Thogoto 3841, 3842, and 3843 were registered in his and Judita Warue Ndwiga's names. That as proprietors, they were only chargors to the plaintiff's sister company Meridian Acceptance Limited whose obligations ended after the discharge of charge. It was however contended that no developments had taken place thereon.
 10. The defendant further contended that it was agreed by all the plaintiff's directors/shareholders that Peter Njeru Karuana, a former director of the plaintiff was to have his share in the two properties in Embu in exchange of ceasing to become the plaintiff's director. That the plaintiff had approached court with unclean hands and was not deserving of the orders sought.
 11. In response, the plaintiff filed a supplementary affidavit of Eduardo Hernandez Ciriza sworn on February 24, 2022. It was averred that Peter Njeru Karuana was still one of the plaintiff's directors as per the CR-12 produced by the plaintiff. That the subdivision of the parcels of land in Embu was not authorized by the plaintiff's directors.
 12. The application was canvassed by way of written submissions. The plaintiff's submissions were dated February 14, 2022 and the defendant's February 24, 2022. The court has considered those submissions as well as the pleadings and evidence before it.
 13. The principles applicable for such an application were settled in the case of *Giella v Cassman Brown & Company Limited (1973) EA 358*. These are that an applicant must establish a *prima facie* case with a probability of succeed. He must show that he will otherwise suffer irreparable loss and damage unless the order sought is granted. Finally, if the court is in doubt, it will determine the matter on a balance of convenience.
 14. On the first limb, the plaintiff has established a case against the defendant for conversion of property, unauthorized subdivision of its property and unauthorized share transfers. Though the defendant pleaded that the subdivision was authorized by the plaintiff and a resolution agreed upon, there was no evidence of such resolution.
 15. The defendant's contention that Peter Njeru Karauna was given his share in the Embu properties and ceased being the plaintiff's director was also unsupported. The evidence before court in the plaintiff's



CR-12 indicated that the said Peter Njeru Karauna was still director of the plaintiff as at December 8, 2021.

16. The plaintiff's case raises serious issues that need judicial consideration as they are triable. However, those issues cannot be determined at this point and must proceed to full trial where witnesses can testify and be cross-examined and necessary evidence produced.
17. There is also an issue of ownership of the properties located in Dagoretti. It is imperative that all these issues be determined in the full hearing of the suit. In the interim, it is paramount that the suit properties be protected to avoid disposal thereof, thus rendering the whole suit nugatory.
18. I state so because, the plaintiff stands to suffer irreparable harm if the injunctive orders are not issued. Its properties are at stake and if further subdivision, sale or even disputed development thereon continues, it stands to suffer irreparable harm. It then follows that a balance of convenience tilts in favor of granting the orders sought.
19. The upshot is that the application is found to be meritorious and is allowed with costs.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 28TH DAY OF OCTOBER, 2022.

A MABEYA, FCI Arb

JUDGE

