



REPUBLIC OF KENYA



**Mugambi Zakayo Nteere Enterprises Ltd & 2 others v Kabutu Enterprises Ltd & another  
(Civil Case E010 of 2022) [2022] KEHC 14637 (KLR) (27 October 2022) (Ruling)**

Neutral citation: [2022] KEHC 14637 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
CIVIL CASE E010 OF 2022  
TW CHERERE, J  
OCTOBER 27, 2022**

**BETWEEN**

**MUGAMBI ZAKAYO NTEERE ENTERPRISES LTD ..... 1<sup>ST</sup> PLAINTIFF**

**MUGAMBI NKIRUTA ENTERPRISES LTD ..... 2<sup>ND</sup> PLAINTIFF**

**SAMMY BUNDI & MARY MUGAMBI (SUING AS LEGAL REPRESENTATIVES  
OF THE ESTATE OF MUGAMBI NKIRUTA (DECEASED)) ..... 3<sup>RD</sup> PLAINTIFF**

**AND**

**KABUTU ENTERPRISES LTD ..... 1<sup>ST</sup> DEFENDANT**

**GATOBU ENTERPRISES LTD ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

**Brief facts**

1. On August 18, 2022, applicants filed a plaint seeking the following orders;
  - a. An order to compel the defendant's tor ender accounts of the 1<sup>st</sup> plaintiff's company for the years 2020/2021 and 2021/2022.
  - b. An order compelling the defendants to submit financial accounts for Mugambi Zakayo Nteere Enterprises Ltd for the year 2020/2021 and 2021/2022.
  - c. A permanent order of injunction to issue against the defendants their servants' agents and or employees from selling, alienating, transferring, charging or in any other way whatsoever dealing with the 1<sup>st</sup> plaintiff's assets pending the hearing and determination of this suit.
  - d. Costs and interests at court rates.



2. Simultaneously with the plaint, applicants filed a notice of motion dated August 17, 2022 seeking the following nine orders:
  1. That this application be certified as extremely urgent and the same be heard *ex-parte* in the first instance.
  2. That this honorable court be pleased to grant leave to the 2<sup>nd</sup> and 3<sup>rd</sup> applicants to continue with the derivative claim seeking relief on behalf of the 1<sup>st</sup> plaintiff in respect to the acts and omissions by the respondents involving negligence and breach of trust in their capacity as Directors of the 1<sup>st</sup> plaintiff.
  3. That this honorable court be pleased to issue orders restraining the respondents, their agents or anyone else acting on their authority from interfering and or withdrawing any funds from Co-operative Bank account No xxxx and from interfering with the 1<sup>st</sup> applicant's business operations, transactions and or assets or in any other way purporting to run the affairs of Mugambi Zakayo Nteere Enterprises Ltd pending the hearing and determination of the derivative suit filed herein.
  4. That this honorable court be pleased to order all the tenants in occupation of the rental houses erected on plot No 27 Nkubu town to deposit their rents in the new joint Co-operative account number xxxx pending the hearing and determination of the derivative suit filed herewith.
  5. That this honorable court be pleased to compel the respondents to render accounts of the 1<sup>st</sup> applicant company pending the hearing and determination of this application.
  6. That this honorable court be pleased to compel the respondents to render accounts of the 1<sup>st</sup> applicant company.
  7. That pending the hearing and determination of the derivative claim filed herewith, the respondents be compelled to produce the books of records, banking slips, audited financial accounts and bank statements of the 1<sup>st</sup> defendant's company for the year 2020/2021 and 2021/2022.
  8. That this honorable court be pleased to make such further orders as may deem necessary for the interest of justice.
  9. That the costs of this application be costs in the cause.
3. Application is supported by an affidavit sworn on August 17, 2022 by the first 3<sup>rd</sup> applicant SammY Bundi Mugambi who is also one of the four directors of the 2<sup>nd</sup> applicant. He deposes that 1<sup>st</sup> applicant owns plot No 127 Nkubu Township whose rents are deposited into Cooperative Bank account No xxxx which he accuses the respondents of issuing cheques to 3<sup>rd</sup> parties without a resolution from the directors of the 1<sup>st</sup> applicant. In support thereof, the deponent has annexed cheques marked SB15 A and B for Kes 50,000/- each, one to his name and the second to Speranza Gakiru.
4. On September 1, 2022, Muriithi J granted prayer No 3 in the following terms:
  3. That an order be and is hereby issued restraining the respondents, their agents or anyone else acting on their authority from interfering and or withdrawing any funds from Cooperative Bank account No xxxx and from interfering with the 1<sup>st</sup> applicant's business operations, transactions and or assets or in any other way purporting to run the affairs of Mugambi Zakayo



Nteere Enterprises Ltd pending the hearing and determination of the derivative suit filed herein.

5. Respondents opposed the application vide two replying affidavits sworn on September 6, 2022, the first by Paul Kaburu Nteere and the second sworn jointly by Joseph Kanyamu Mugambi and Harun Kirema Mugambi.
6. Paul Kaburu Nteere avers that the directors of the 1<sup>st</sup> applicant are the 2<sup>nd</sup> applicant and the 1<sup>st</sup> and 2<sup>nd</sup> respondents and that the majority shareholders of the 4 companies have not sanctioned this action. He additionally avers that the 3<sup>rd</sup> applicants have not obtained the requisite authority to represent the estate of Mugambi Nkiruta and denied that any funds belonging to the 1<sup>st</sup> applicant had been misappropriated.
7. Joseph Kanyamu Mugambi and Harun Kirema Mugambi who together with the first 3<sup>rd</sup> applicant are co-directors of the 2<sup>nd</sup> applicant similarly denied that any funds belonging to the 1<sup>st</sup> applicant had been misappropriated and faulted the 3<sup>rd</sup> applicants for bringing this cause before obtaining representation for the estate of Mugambi Nkiruta. The deponents fault the applicants for forum shopping for the reason that they had filed Nkubu SPMCC No E036 of 2022 raising similar issues which was pending as at the time this suit was filed.
8. By his supplementary affidavit sworn on September 28, 2022, the first 3<sup>rd</sup> applicant conceded that letters of representation to the estate of Mugambi Nkiruta were issued on August 25, 2022 which was a week after this suit was filed. He similarly conceded that a similar matter to this one had been filed vide Nkubu SPMCC No E036 of 2022 but stated that it had been withdrawn.
9. I have considered the application in the light of the affidavits on record and annexures thereto and submissions filed on behalf of the parties and I have identified the following issues for determination
  1. Jurisdiction
  2. Legal capacity of the 3<sup>rd</sup> applicants
  3. Whether an injunction is merited
  4. Whether leave to bring a derivative suit out to be granted
  5. Who bears the costs of the application

### **Jurisdiction**

10. in the case of the *Owners of the Motor Vessel Lilian 'S' v Caltex Kenya Limited* (1989) KLR 1, the court stated that

“ ..... jurisdiction is everything without it; a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction”.
11. It has been conceded by the first 3<sup>rd</sup> applicant that as at the time of filing this suit, Nkubu SPMCC No E036 of 2022 between the parties herein over the same subject matter as the one in this suit was pending at the Nkubu Magistrate’s Court. Whereas is averred that the suit has been withdrawn, what the first 3<sup>rd</sup> applicant has annexed to his supplementary affidavit is a letter to the court referring to a notice of withdrawal of the suit allegedly issued on September 21, 2022. Neither the notice to withdraw the



suit nor the order of withdrawal were presented before this court to demonstrate that indeed Nkubu SPMCC No E036 of 2022 has been withdrawn.

12. From the foregoing, it is apparent that this suit and summons offend the provisions of section 6 of the Civil Procedure Act which provides that “No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”
13. The Supreme Court of Kenya in Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties) [2020] eKLR pronounced itself on the subject of *sub judice* as follows:

“The term ‘sub-judice’ is defined in Black’s Law Dictionary 9<sup>th</sup> edition as: “Before the court or judge for determination.” The purpose of the sub-judice rule is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the court process and diminish the chances of courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter. This means that when two or more cases are filed between the same parties on the same subject matter before courts with jurisdiction, the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit.”

14. In the absence of evidence of withdrawal of Nkubu SPMCC No E036 of 2022, I find that these proceedings ought not to be entertained and I have no doubt in my mind that had this information been brought to the attention of the court, the ex parte order issued on 01<sup>st</sup> September, might not have been issued.

### **Locus Standi of the 3<sup>rd</sup> Applicants**

15. Locus standi signifies a right to be heard. A person must have sufficiency of interest to sustain his standing to sue in a court of law. In Kibera Blessed Academy v World Missionary Evangelism of Kenya Registered Trustees & 4 others (2016) eKLR it was held that:

“If a party is found to have no *locus standi*, it means that he or she cannot be heard even on whether or not he has a case worth listening to.”

16. In Julian Adoyo Ongunga & another v Francis Kiberenge Bondeva (Suing as the Administrator of the Estate of Fanuel Evans Amudavi, Deceased) [2016] eKLR,, the court stated as follows concerning a party filing suit without having obtained a limited grant:

“Further the issue of locus standi is so cardinal in a civil matter since it runs through to the heart of the case simply put, a party without locus in a civil suit lacks the right to institute and or maintain suit even where a valid cause of action subsists. Locus standi relates mainly to the legal capacity of a party. The impact of a party in suit without locus can be equated to that of a court acting without jurisdiction. Since it all amounts to null and void proceedings. It is also worth noting that the issue of locus standi becomes such a serious one where the matter involves the estate of a deceased person, since in most cases the estate involves several other beneficiaries or interested parties.”



17. By his supplementary affidavit sworn on September 28, 2022, the first 3<sup>rd</sup> applicant conceded that letters of representation to the estate of Mugambi Nkiruta were issued on August 25, 2022 which was a week after this suit was filed and they therefore did not have the legal capacity to file this suit.

### **Whether an Injunction is Merited**

18. Any discussion on temporary injunctions is not complete without reiteration of the requirements for grant of injunctions as set-out in the *Giella vs Cassman Brown* [1973] EA 358 as follows:

“First, an applicant must show a *prima facie* case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not be adequately compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”

19. The principles on which courts will grant an injunction were restated by the Court of Appeal in *Nguruman Limited v Jan Bonde Nielsen & 2 others*, CA No 77 of 2012, together with the mode of their application 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.”

20. From the foregoing, 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. (See *Kenya Commercial Finance Co Ltd v Afraba Education Society* [2001] vol 1 EA 86).

21. The Court of Appeal in the case of *Mrao Ltd vs First American Bank of Kenya and 2 others* [2003] eKLR interpreted the condition as to *prima facie* case as follows:

“A *prima facie* case in a civil application includes but is not confined to a “genuine and arguable case”. It is a case which on the material presented to court; a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the other party as to call for an explanation or rebuttal from the latter.”

22. Other than contend that there is misappropriation of funds from 1<sup>st</sup> applicant’s Cooperative Bank account No xxxx, applicants did not place any material before the court to demonstrate that withdrawals from the account had been expended for any other purpose other than for the interest of the 1<sup>st</sup> applicant or that respondents had in any way interfered with the 1<sup>st</sup> applicant’s business operations, transactions and or assets.

23. Further to the foregoing, the plaint filed by the applicants does not include a prayer for injunction in relation to Cooperative Bank account No xxxx. It is trite that parties are bound by their pleadings (See *Independent Electoral and Boundaries Commission & another vs Stephen Mutinda Mule & 3 others* [2014] eKLR). It is also trite that a party seeking a temporary injunction ought to anchor the prayer in the statement of claim in the plaint and where this has not been, a party is disentitled to such a relief



sought in a subsequent application (See *Sunrise Properties Limited vs Fifty Investments Ltd & another* [2007] eKLR and *Yang Guang Property Design & Manufacturing Limited v China Wu Yi Company (K) Limited* [2021] eKLR ).

## Costs

24. Section 27(1) of the *Civil Procedure Act* gives courts unfettered discretion to determine by whom costs are to be paid. It is trite that costs follow the event and a successful litigant ought to be fairly reimbursed for the costs that he has had to incur.
25. Arising from the foregoing analysis, I proceed to issue the following orders:
  1. The 3<sup>rd</sup> plaintiff/ applicants did not at the time of filing this suit have the legal capacity to represent the estate of Mugambi Nkiruta. The 3<sup>rd</sup> plaintiff/applicants are therefore struck out of this suit.
  2. The orders of temporary injunction sought in the notice of motion dated August 17, 2022 are barred by order 2 rule 6(1) of the *Civil Procedure Rules* and are unsustainable.
  3. The order restraining the respondents, their agents or anyone else acting on their authority from interfering and or withdrawing any funds from Cooperative Bank account No xxxx and from interfering with the 1<sup>st</sup> applicant's business operations, transactions and or assets or in any other way purporting to run the affairs of Mugambi Zakayo Nteere Enterprises Ltd pending the hearing and determination of the derivative suit issued on September 1, 2022 is set aside,
  4. This suit is stayed pending the determination to be made in Nkubu SPMCC No E036 of 2022 that was filed earlier
  5. The determination of whether leave to bring a derivative suit ought to be granted is similarly stayed pending the determination to be made in Nkubu SPMCC No E036 of 2022 that was filed earlier
  6. Applicants shall bear the costs of this application
  7. Mention on December 15, 2022 to confirm the outcome in Nkubu SPMCC No E036 of 2022 and for further orders

**DELIVERED THIS 27<sup>TH</sup> DAY OF OCTOBER 2022**

**WAMAE. T. W. CHERERE**

**JUDGE**

### Appearances

Court Assistant - Kinoti

For Applicants - Mr. Mwiti for Joshua Mwiti & Co. Advocates

For Respondents - Mr. Muriira for Mwenda, Mwarania, Akwalu & Co. Advocates

