



**Wekhan Investment Limited & another v Wambui & 3 others (Civil Case E435 of 2019)
[2021] KEHC 407 (KLR) (Commercial and Tax) (16 December 2021) (Ruling)**

Neutral citation: [2021] KEHC 407 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE E435 OF 2019
WA OKWANY, J
DECEMBER 16, 2021**

BETWEEN

**WEKHAN INVESTMENT LIMITED 1ST APPLICANT
STEPHEN MWANGI GITHINJI 2ND APPLICANT**

AND

**MARGARET WAMBUI 1ST RESPONDENT
DANSON NGOTHO 2ND RESPONDENT
GRACE NJERI NDERITU 3RD RESPONDENT
ALEX KAMAU 4TH RESPONDENT**

RULING

1. This ruling is in respect to the application dated 3rd December 2019 where the applicant seeks the following orders: -
 - a. Spent.
 - b. Spent.
 - c. THAT this Honourable court be pleased to compel the respondents to render account of the 1st applicant company pending hearing and determination of this application.
 - d. THAT this honourable court be pleased to issue orders restraining the respondents, their agents or anyone acting on their authority from interfering with the bank account, business operations, transactions and/or assets or in



any other way purporting to run the affairs of Wekhan Investment Limited pending hearing and determination of the suit filed herewith.

- e. This honourable court be pleased to compel the Respondents to render account of the 1st applicant Company pending hearing and determination of the suit filed herewith.
 - f. THAT this honourable court be pleased to issue any other orders in the interest of justice
 - g. THAT the cost of this application be in the cause.
2. The application is supported by the affidavit of the 2nd applicant, Mr. Stephen Mwangi Githinji, and is based on the following grounds: -
1. THAT the applicant is one of the directors of the 1st Applicant Company and also a signatory to its bank account together with the respondents.
 2. THAT the 1st applicant is a Limited Liability Company whose purpose is to help its members invest in various ventures such as purchasing land.
 3. THAT the respondents acting in such capacity, coerced the applicant into signing a cheque for release of monies from the Company account which monies were not clearly accounted for.
 4. THAT the respondents have also failed and/or neglected to account for the said monies and have continuously authorized withdrawal of funds without the 2nd Applicants knowledge and/or approval.
 5. THAT the respondents acts and/or omissions are not geared towards promoting the success of the Applicant Company, neither are the said respondents exercising reasonable care, skill and diligence in performing their tasks as key officials to the company.
 6. THAT respondent's acts and omissions are contrary to the provisions of the Companies Act No 17 of 2015 and as such, prejudicial to the Applicant Company.
 7. THAT despite the 2nd applicant requesting for accountability of monies withdrawn, the respondents have blatantly neglected and or refuse to give a proper account reflecting the true financial position of the Company.
3. The respondents opposed the application through the 4th defendant's replying affidavit wherein he states that the 2nd plaintiff having resigned as a director on 30th June 2019 is neither a director nor a signatory to any of the bank accounts having been removed by a resolution of the shareholders. He further states that Mwangi Githinji cannot authorize the release of the 1st defendant's funds as alleged and that the respondents have been running the affairs of the 1st plaintiff in the best interest of the shareholders.
4. Parties canvassed the application by way of written submissions which I have considered. The main issue for determination is whether the applicant has made out a case for the granting of the orders sought. The applicant seeks orders for the rendering of the accounts of the applicant Company and an order of injunction to restrain the respondents from interfering with the bank accounts and business



operations of the Company. According to the applicant, the respondents have made withdrawals from the Company bank accounts but have refused to render accounts.

5. On their part, the respondents contend that the application is incompetent as the applicant lacks the locus standi to institute the suit. The respondents submitted that the applicant, having resigned as a director, was not a signatory of the Companies bank account.
6. The principles governing the granting of orders of temporary injunction were set out in the case of *Giella vs Cassman Brown and Company Limited (1973) E.A 385*, where Spry J. held that: -

“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. 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 adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”

Prima facie case

7. A prima facie case was defined in the case of *Mrao Limited vs First American Bank of Kenya and 2 Others (2003) KLR 125*, where the Court of Appeal in determining what amounts to a prima facie case stated: -

“A prima facie case in a Civil Case includes but is not confined to a “genuine or arguable” case. It is a case which on the material presented to the court; a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant’s case upon trial. That is clearly a standard, which is higher than an arguable case.”

8. In determining whether the applicants have demonstrated that they have a prima facie case, it is important to address the issue of Locus Standi as the respondents averred that the application is incompetent for lack of locus standi. According to the respondent the applicant ought to have instituted the suit as a derivative claim.

238. (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;
- (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.

9. The above section defines a derivative claim to mean proceedings by a member of a company in respect to a member of a company over a cause of action vested in the company and seeking relief on behalf of the company. It was not disputed that the application was not brought as a derivative claim. I however note that leave to institute a derivative claim can be sought even after the commencement of the suit. My finding is that in view of the fact that the suit has not been heard and determined, there is still room for the applicant to seek leave to file a derivative suit.
10. With regard to the prayers for orders of injunction to stop the operations of the Companies Bank account, I find that the applicants did not demonstrate that they how they will suffer irreparable harm that cannot be compensated by damages should the court decline to grant the orders of injunction. Courts have also taken the position that they will not interfere with the running of the affairs of a company (see *Foss vs Harbottle [1843] 2 Hare 461*).
11. In the upshot, I find that the prayer for orders of injunction is not merited. I however note that the prayer for the rendering of accounts is important to the determination of main suit as it will aid the court in determining the main suit. For this reason, I allow prayer C of the application and direct that the respondents render the accounts within 30 days from the date of this ruling. The costs of this application shall be in the cause.
12. Mention on 23rd March 2022.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT NAIROBI THIS 16TH DAY OF DECEMBER 2021 IN VIEW OF THE DECLARATION OF MEASURES RESTRICTING COURT OPERATIONS DUE TO COVID-19 PANDEMIC AND IN LIGHT OF THE DIRECTIONS ISSUED BY HIS LORDSHIP, THE CHIEF JUSTICE ON THE 17TH APRIL 2020.

W. A. OKWANY

JUDGE

In the presence of: -

Ms Olwe for Okatch for the Applicants.

Court Assistant: Margaret

