



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

HCCC NO. E245 OF 2020

ERIC MUHIU MWANGI.....PLAINTIFF/APPLICANT

-VERSUS-

WENDO NG'ONGO AGENCIES LIMITED.....DEFENDANT/RESPONDENT

RULING

1. This ruling is in respect to the application dated 7th July 2020 wherein the plaintiff/applicant seeks the following orders: -

1. Spent

2. Spent

3. That pending the hearing and determination of this suit the defendant/respondent themselves, their servants and or agents be ordered to stop any sale of assets belonging to the respondent/defendant company, any distribution of dividends, sharing of proceeds/benefits from sale of any properties to the Directors and shareholders.

4. That pending the hearing and determination of this application the defendant/respondent be ordered to produce the list of all current and former shareholders of the company, all the minutes of the defendants meeting from the year 2004 to date, the register book where the shareholders sign when they attend Annual General meetings and the book where members sign acknowledging receipt of the dividends.

5. That pending the hearing and determination of this application the defendant/respondent be ordered to produce the audited accounts including balance sheets with the list of all assets and liabilities of the defendant company from 2004.

6. That this honourable court do allow the plaintiff to serve the defendants through advertisement in one of the leading local dailies as the defendants do not have a known physical address for service.

7. That this honourable court be pleased to give any other or further orders as it may deem fit and just in the circumstances.

2. The application is brought under Sections 103 and 320 (7) of the Companies Act, is supported by the plaintiff's affidavit and is premised on the grounds that: -

1. The plaintiff is an ordinary share holder of the defendant company since 2004. That the plaintiff had been attending Annual General Meeting as evidenced by the Annual General Meeting minutes for the years 2007, 2008, 2011 and 2012 which are herein attached.

2. The respondent has refused, failed and or neglected to inform the plaintiff on the happenings of the company including Annual General Meetings since 2013.

3. That the defendant/respondent has been disposing off, dividing properties and sharing profits and dividends amongst other shareholders leaving out the plaintiff from the year 2013.

4. That the plaintiff has learnt from credible sources that the defendant has recently disposed of a plot situated at Pangani area and are in process of sharing the proceeds leaving out the plaintiff/applicant.

5. That the defendants/respondents have taken advantage of the vulnerability of the plaintiff who has been busy taking care of his differently able sibling as he is not able to be away for long.

6. That it's been very difficult for the plaintiff to make follow ups as the defendant does not have a known physical address for its operations.

7. That unless this honourable court grants the orders sought, the applicant/plaintiff will greatly be prejudiced.

3. The respondent opposed the application through the replying affidavit of its Director **John Mburu Muhiu** who avers that that the applicant is a complete stranger to the company as he is neither a shareholder nor a director of the company. He states that plaintiff is his nephew who is under a mistaken belief that the defendant's deponent holds shares in the company in trust for him.

4. He avers that the documents produced by the applicant are not authentic or official documents of the company. It is the respondent's case that the applicant has not established a prima facie case against it so as to warrant the granting of the orders sought in the application.

5. 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 orders of injunction.

6. The law on granting of interlocutory injunction is set out under order 40(1) (a) and (b) of the Civil Procedure Rules 2010 which provides as follows: -

"Where in any suit it is proved by affidavit or otherwise—

(a) That any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or [Rev. 2012] Civil Procedure CAP. 21 [Subsidiary] C17 – 165;

(b) That the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further."

7. The conditions for consideration further in granting an injunction is now well settled in the case of **Giella v Cassman Brown & Company Limited (1973) E A 358**, where the court expressed itself on the conditions that a party must satisfy for the court to grant an interlocutory injunction 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 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."

8. The test for granting of an interlocutory injunction was considered in the American **Cyanamid Co. v Ethicom Limited (1975) A AER 504** where three elements were noted to be of great importance namely:

i. There must be a serious/fair issue to be tried,

ii. Damages are not an adequate remedy,

iii. The balance of convenience lies in favour of granting or refusing the application.

Prima facie case.

9. In **Mrao Ltd v First American Bank of Kenya and 2 others, (2003) KLR 125** which was cited with approval in **Moses C. Muhia Njoroge & 2 others v Jane W Lesaloi and 5 others, (2014) eKLR**, the Court of Appeal defined a prima facie case as follows: -

"A Prima facie case in a civil application includes but not confined to a genuine and 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 later".

10. The circumstances for consideration before granting a temporary injunction under **order 40 Rule 1 of the Civil Procedure Rules** requires a proof that any property in dispute in a suit is in a danger of being wasted, damaged or alienated by any party to the suit or wrongfully sold in execution of a decree or that the defendant threatens or intends to remove or dispose the property, the court is in such situations enjoined to grant a temporary injunction to restrain such acts.

11. Applying the above stated principles of injunction to the instant case, I note that even though the applicant claims that the respondent has been selling off the assets of the Company, dividing properties and sharing profits/dividends among shareholders, no material has been placed before this court to support the claims. For example, the applicant has not demonstrated that the respondent owns land in Pangani area that has been sold or is about to be sold so as to warrant the granting of the injunctive orders sought.

12. The respondent's case was that the plaintiff is not a shareholder of the company as he alleges and is therefore not entitled to the orders sought against the company. The respondent maintained that the purported minutes of the Company's Annual General Meetings produced by the plaintiff were unsigned save for the minutes of 23rd June 2007 which even though signed, was not without fault as it was signed on a different date from the dated of the alleged next General Meeting thus raising questions on its authenticity. For this argument, the respondent cited the decision in *Wilber Khasilwa Otichilo v Speaker, County Assembly of Vihiga & 2 Others* [2020] eKLR where the court stated that:

“Execution of documents authenticates them. A document that is unexecuted has no authenticity, and no value should be attached to it.”

13. I have perused the documents attached to the applicant's supporting affidavit as annexures in support of the claim that he is a shareholder in the respondent company and I note that annexure “EMM1” are letters addressed to shareholders generally and not the applicant specifically while annexure “EMM2” are unsigned minutes of the various General Meetings of the company save for the minutes of 23rd June 2007 wherein the applicant is not listed as a shareholder.

14. My finding is that the applicant herein has not established his alleged shareholding in the company so as to entitle him to the orders sought in the application. I further note that if indeed the applicant is a shareholder in the company, as he alleges, nothing would have been easier than for him to produce his shareholder's certificate or proof of purchase of shares in support of his claim. I also note that the official search of the company's shareholding particulars does not contain the plaintiff's details. In the absence of the proof of his alleged shareholder status in the company, this court finds that the injunctive orders sought by the plaintiff cannot be granted as his *locus standi* to institute this case is in doubt. I am guided by the decision in *Kenleb Cons Ltd v New Gatitu Service Station Ltd & another, (1990) eKLR* where the court held as follows on what a party seeking an injunction must demonstrate:

“To succeed in an application for injunction, an applicant must not only make a full and frank disclosure of all relevant facts to the just determination of the application but must also show he has a right legal or equitable, which requires protection by injunction.”

Irreparable loss

15. Courts have held that irreparable loss is loss or injury incapable of compensation by an award of damages. (See *Kitur v Standard Chartered Bank & 2 others (2002) 1KLR*)

16. I have perused the plaint filed herein and I note that the orders sought are for payment of dividends, dues, income and proceeds realized from the sale of company assets. To my mind, the plaintiff's claim is monetary in nature and is thus quantifiable. The applicant has not indicated that the respondent will not be in a position to pay the said dues at the end of the case should the main suit be determined in his favour. I am therefore not satisfied that the applicant has demonstrated that he will suffer irreparable loss should the orders of injunction sought herein be disallowed.

Balance of convenience.

17. In *Paul Gitonga Wanjau v Gathuthis Tea Factor Company Ltd & 2 others (2016) eKLR*, the court expressed itself as follows on the subject of balance of convenience: -

“Where any doubt exists as to the applicants' right, or if the right is not disputed, but its violation is denied, the court, in determining whether an interlocutory injunction should be granted, takes into consideration the balance of convenience to the parties and the nature of the injury which the Respondent on the other hand, would suffer if the injunction was granted and he should ultimately turn out to be right and that which injury the applicant, on the other hand, might sustain if the injunction was refused and he should ultimately turn out to be right... Thus, the court makes a determination as to which party will suffer the greater harm with the outcome of the motion. If applicant has a strong case on the merits or there is significant irreparable harm, it may influence the balance in favour of granting an injunction. The court will seek to maintain the status quo in determining where the balance on convenience lies. ”

18. Having regard to my above findings on prima facie case and irreparable loss, it follows that the balance of convenience tilts in favour of not granting the orders sought. Moreover, courts have taken the position that they will not interfere with the internal affairs of the company. My position is bolstered by the decision in *Foss v Harbottle (1843) 2 Hare 261* where it was stated that courts will interfere only where acts complained of is ultra vires, or is fraudulent or not rectifiable by an ordinary resolution. In the instant case, I find that the matters complained of do not border on fraud or ultra vires but are issues that can be resolved by the company itself.

19. The applicant also sought orders for the production of the list of shareholders, minutes, register books, audited accounts among other documents. Section 320(7) of the Companies Act stipulates as follows:

“If a company refuses to allow an inspection as requested under subsection (3), or to provide a copy of a record requested under subsection (4), the court may, on the application of a person affected by the refusal, make an order compelling the company to allow an immediate inspection of the records, or to provide that person with a copy of the requested record.”

20. The applicant indicated that all his attempts to obtain the documents from the respondent did not bear any fruits as the respondent declined to furnish him with the said records thus necessitating the filing of this suit. I am therefore satisfied that the applicant has made out a case for the granting of orders to inspect the respondent's records.

21. For the above reasons I find that the application dated 7th July 2020 succeeds, albeit partly, as while I decline to grant the prayer for injunction, I allow the second limb of the application as follows: -

a. That pending the hearing and determination of the main suit, the defendant/respondent is ordered to produce the list of all current and former shareholders of the company, all the minutes of the defendants meeting from the year 2004 to date, the register book where the shareholders sign when they attend Annual General meetings and the book where members sign acknowledging receipt of the dividends.

b. That pending the hearing and determination of the main suit, the defendant/respondent is ordered to produce the audited accounts including balance sheets with the list of all assets and liabilities of the defendant company from 2004.

c. The costs of this application shall abide the outcome of the main suit.

Dated, signed and delivered via Microsoft Teams at Nairobi this 17th day of December 2020 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:

Mr. Kariuki Karanja for the applicant

Miss Mburu for Nyawara for Defendant/Respondent

Court Assistant: Sylvia