



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**COMMERCIAL & TAX DIVISION**  
**CIVIL CASE NO. 497 OF 2009**

**TITUS THUO MACHARIA (SUING ON HIS BEHALF**

**AND ON BEHALF OF THE ESTATE OF ALICE**

**MUTHONI GICHUHI (DECEASED).....1<sup>ST</sup> PLAINTIFF**

**SUITABLE BAR LIMITED.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**TERRACE HOTEL LIMITED.....DEFENDANT**

**RULING**

1. The Application herein is a Notice of Motion Application dated 7<sup>th</sup> April 2015 seeking for an order of an injunction to restrain the Defendant/Respondent and/or their employees, or servants or agents from assigning or otherwise dealing in any way with the shares and/or any dividends due to the shares initially owned by the Late Kamau Kori, which are the subject of this suit, pending the hearing and determination of this suit. That further, the Respondent be restrained from passing any Company or Board resolution incorporating the votes of the Estate of the deceased, until the suit is heard and determined. The costs of this Application be provided for.

2. The Application is brought under Section 1A, 1B, 3A, and 22 of the Civil Procedure Act and Order 40 Rule 1, 2, 3 and 4 of the Civil Procedure Rules. It is supported by the grounds on the face of it, and the Affidavit sworn by Titus Thuo Macharia.

3. The Applicants avers that, the Late Kamau Kori, sold his shares in Terrace Limited, the Defendant Company to the Applicants. However, since 1997 the Respondents have failed to invite the Applicants to attend the Annual General Meetings of the Company. The Respondents have passed several resolutions to make major adjustments in the management of the Company. These resolutions will have far reaching ramification on the management and well being of the Respondent Company as a going concern. That, in addition the Respondent plan to receive, consider, and adopt the Audited Financial Report of the Company for the years 2013, 2014, and 2015 and thereafter declare dividends. If the said dividends are given to the estate of the deceased, Kamau Kori, then the Applicants will be greatly prejudiced. If such dividends are declared, it should be held by the Respondents in trust for the eventual beneficiary upon the conclusion of the matter herein.

4. The Application was however opposed based on the grounds of opposition filed herein. The grounds are that, the Applicants lack the locus standi to institute this suit and the Application. The minutes of the meeting that deliberated the sale of shares and the accompanying transfer forms have not been exhibited as evidence of the transfer. The Application thus an afterthought and the prayers herein are directed to the wrong party. The company is in the process of winding up under the Winding up Cause No. 1 of 2000 before the High Court Milimani.

5. The parties agreed to dispose of the Application vide written submission. The Applicants filed their submission on 28<sup>th</sup> September 2015, submitting that, the 1<sup>st</sup> Plaintiff/Applicant is suing on behalf of the estate of the Late Alice Muthoni Gichuhi and a Director of the 2<sup>nd</sup> Plaintiff/Applicant. The Applicants further submitted that, the whole purpose of the injunctive order is to preserve the status quo and referred to the case of Noormohamed *Janmohamed Vs Kassamali Virji Madhani (1953) 20 EACA 8*. Further reference was made to the case of *Gella Vs Cassman Brown Ltd (1973)* which deals with the principles that govern the grant of an order for an injunction. The same is reinstated in the case of *Kitur & Another Vs Standard Chartered Bank & 2 Others (2002) 1 KLR 630*. Whereas the case of *Mrao Vs First American Bank of (K) Ltd & 2 others 2003 KLR 125*, was cited to explain what constitute a prima facie case.

6. The Applicants submitted that, if the Estate of Kamau Kora is allowed to participate or in any way vote for the Defendant Company resolutions, the Applicant will be prejudiced and “rendered a nugatory as it will have no legs to stand on”. The Applicants further submitted that, even if the Court finds that damages are adequate, that in itself does not disentitle the Applicants, to the interim relief sought in the nature of injunction. Reliance was placed on the case of *Waithera Vs Industrial and Commercial Development Corporation (2001) KLR 381* and the case of *Joseph Siro Mosioma Vs HFCK & 3 Others NBI HCCC No. 265 of 2007*. The Applicants thus argued that if the preservation order is not granted, in terms of prayer 4 and 5, the Applicants stands to suffer irreparable damage that cannot be compensated by mere damages or costs.

7. Finally, the Applicant submitted that, the balance of convenience tilts in its favour, and the Honourable Court has the power “to do that which ultimately serves substantive justice and fairness to the Applicant”. Reference was made to the case of *Jan Bolden Niesel Vs Herman Phillipus Steya* also known as *Hermannus Phillipus Steya & 2 Others (2012) eKLR*.

8. In response submission, the Respondent submitted that, it is important for the Applicant to prove that he has authority to represent the Estate of the deceased Alice Muthoni Gichuhi, by exhibiting letters of Administration in his names. Secondly the 2<sup>nd</sup> Plaintiff being a Limited Liability Company, it would have been necessary to exhibit a document showing that, the deceased was a Director or shareholder of the 2<sup>nd</sup> Plaintiff Company; and further that, the Defendant Company is in existence by exhibiting the Certificate of Incorporation. Similarly, the Plaintiffs have not demonstrated that, they have a claim against the Defendants. The nexus between the Plaintiff and the Defendant is not clearly set out or demonstrated. The Minutes of the meeting and resolutions that indicate that dividends were to be paid have not been produced.

9. Finally, the Respondent submitted that, the Applicant has not met the threshold of grant of an order for an injunction. That, shares have monetary value, and the balance of convenience tilts in favour of the Respondents as the relationship between the Defendant and the pleadings is not shown.

10. I have considered the rival submissions alongside the Affidavit in support of the Application and grounds of opposition filed. The first issue I will address is whether the 1<sup>st</sup> Applicant has locus standi to institute the proceedings herein. The 1<sup>st</sup> Plaintiff/Applicant describes himself in the pleadings as “suing on his own behalf and on behalf of the Estate of Alice Muthoni Gichuhi (Deceased)”. The Respondents submitted that, there is no evidence that the Applicant has authority to sue on behalf of the estate of Alice Muthoni Gichuhi. I have however, noted that, there is an Application in the Court file dated 29<sup>th</sup> October seeking for substitution of the 1<sup>st</sup> Applicant with the deceased. Attached to the Affidavit sworn by Titus Thuo Macharia, in support of this Application, is a death certificate of the said deceased Alice Muthoni

Gichuhi marked “TTM 1”. Similarly, there is a Limited Grant ad Litem granted to Titus Thuo Macharia to represent the Estate of the deceased, issued by the High Court on the 20<sup>th</sup> August 2013. On the 16<sup>th</sup> May 2014, the Court herein allowed Titus Thuo Macharia to be substituted in the place of the deceased as a 1<sup>st</sup> Plaintiff. Unfortunately the copies of these documents were not annexed on the Affidavit in support of this Application. However the arguments by the Respondents that the 1<sup>st</sup> Applicant has no locus standi therefore do not merit and stands to fail.

11. The only issue raised by the Respondents, I am inclined to agree with is proof of existence of the 2<sup>nd</sup> Plaintiff/Applicant. As a Limited Liability Company, the 2<sup>nd</sup> Plaintiff/Applicant identity can only be established through production of a Certificate of Incorporation. Similarly no cause of action can be instituted in the name of a limited liability Company without a resolution passed by the Company through the Board of Directors. Such an action can only be valid if sanctioned and executed by the Board of Directors. I have realized that, the Application indicates that it is filed by the law firm of Wairagu & Wairagu on behalf of the “Plaintiff”/“Applicant”. Yet the face of the Application shows both Plaintiffs are Applicants. The Affidavit in support thereof does not make reference to the 2<sup>nd</sup> Plaintiff/Applicant at all. The question is this, is this Application made by the 1<sup>st</sup> Plaintiff/Applicant alone or by both Plaintiffs/Applicants. If it is intended to be made on behalf of both, then, there is no presence of the 2<sup>nd</sup> Plaintiff/Applicant. I find no locus standi for the 2<sup>nd</sup> Plaintiff to seek for any orders herein and no orders can be issued on the same in its favour. As also submitted by the Respondent there is no evidence the deceased Alice Muthoni Gichuhi was a Director or Shareholder in the 2<sup>nd</sup> Plaintiff Company. I agree there is no such proof.

12. I have also noted that heavy reference has been made to the Estate of the Late Kamau Kori, who allegedly owned the subject Shares in the Respondent Company. That Estate of the Late Kamau Kori, is not a Party to this suit. How then can orders be made that will adversely affect them without their knowledge? The Applicant ought to have notified them of this matter.

13. Be it as it may, if the Court has to determine the issues raised herein by the Applicant on merit, evidence has to be adduced to prove inter alia the transfer of shares from the Late Estate of the Late Kamau Kori to the deceased Alice Muthoni Gichuhi, the relationship between the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs, the locus standi of the 2<sup>nd</sup> Plaintiff to sue and what each Plaintiff is suing for. I have looked at the amended statement of Defence herein dated 28<sup>th</sup> March, 2011 and the Defendant has denied knowledge of the Plaintiffs as its Shareholders as alleged in the Plaintiff and Amended Statement of Plaintiff dated 21<sup>st</sup> February, 2012 and the Plaintiffs’ claims.

14. The Defendant Company has I believe so many shareholders, the Court has to protect these other shareholders by what order it issues. It will not be in the interest of justice to issue a blanket order stopping the Company from holding an Annual General Meeting or passing resolution. Even then the Resolution passed should preserve the rights attaching to the subject Shares herein so as not to render this suit an academic exercise.

15. In that regard and in view of the fact that this matter has been in Court since the year 2009, I order the Parties herein to set down this suit for hearing within ninety (90) days of this order. Failure of which the suit will stand dismissed without further reference to Court. The costs of this Application to abide the outcome of the suit.

16. Ordered accordingly.

**Dated, delivered and signed on this 30<sup>th</sup> day of May 2017 in an open Court at Nairobi.**

**G.L.NZIOKA**

**JUDGE**

**In the Presence of:**

Ms. Atuya for the Applicant

Mr. Gachomo for the Respondent

Teresia - Court Assistant