



Blue Ocean Branding Limited & another v Brand Track Limited & 3 others (Commercial Case E036 of 2024) [2025] KEHC 3245 (KLR) (Commercial and Tax) (10 February 2025) (Ruling)

Neutral citation: [2025] KEHC 3245 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E036 OF 2024
JWW MONG'ARE, J
FEBRUARY 10, 2025**

BETWEEN

**THE BLUE OCEAN BRANDING LIMITED 1ST PLAINTIFF
NEWTON NDERITU NYAGA 2ND PLAINTIFF**

AND

**BRAND TRACK LIMITED 1ST DEFENDANT
DANIEL NJOROGE KANG'ETHE 2ND DEFENDANT
JOGANDRIES AUCTIONEERS 3RD DEFENDANT
PHILLIPS INTERNATIONAL AUCTIONEERS 4TH DEFENDANT**

RULING

Introduction and Background

1. The Plaintiffs (“Blue Ocean” and “Newton”) filed the present suit stating that at all material times, Blue Ocean was carrying out textile branding & printing business within its premises located on LR No. 2029/2017, No. 9 along Keekorok road within Nairobi County and that Newton has all along been acting as its Managing Director whereas the 2nd Defendant (“Daniel”) was his Co-director and Shareholder. However, it appears that the business relationship has broken down as the Plaintiffs accuse the 1st Defendant company (“Brand Track”), owned by Daniel, and Daniel of fraudulently scheming to unlawfully, illegally and irregularly take and sell Blue Ocean’s goods and/or machines/ tools of trade.
2. Newton claims that on or about 24th January 2024 at around 5am, he started receiving unusual but persistent distress calls from some of Blue Ocean’s employees who were working over the night shift



at the business premises. The employees informed him that Daniel, together with a group of people wielding crude weapons took away various machines, equipment and electronic appliances. When Newton demanded an explanation from Daniel, he was shown a Court Order issued on 5th December 2023 in Milimani CMMISC/E1860/2023; Joseph Nderitu T/A Jogandries Auctioneers & Brand Truck Limited v Blue Ocean Branding Limited and based on an alleged debt between Blue Ocean as the Debtor and Brand Track as the Creditor. The Plaintiffs deny any such debt and claim that the Notification of Sale issued by the 4th Defendant (“the Auctioneers”) indicated that it was against Newton and yet he was not a party to the said pleadings that gave rise to the order. Further, that there was no disclosure either to the court or to the Plaintiff as to how the claimed debt arose.

3. As the said Notification of Sale indicated that an auction for the confiscated goods was to be done on 2nd February 2024, the Plaintiffs filed the Notice of Motion dated 30th January 2024 made under Order 40 Rules 1,2&3 and Order 51 Rules 1,2&3 of the Civil Procedure Rules and sections 1A, 1B & 3A of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) seeking an injunction to forestall the sale and also reconstitute the said goods back to Blue Ocean pending the hearing and determination of this suit. The application is supported by the grounds on its face and Newton’s affidavits sworn on 30th January 2024 and 3rd April 2024. It is opposed by the Defendants through the Notice of Preliminary Objection dated 2nd April 2024 (“the Objection”), the replying affidavits by Daniel sworn on 18th March 2024 and the replying affidavit sworn on 22nd February 2024 by the Auctioneer’s director, GEORGE N. MUIRURI.
4. The application was disposed by way of written submissions which are on record and together with the pleadings, I will make relevant references to in my analysis and determination below.

Analysis and Determination

5. Before determining the substance of the application, I note that the Defendants have raised the Objection that the suit offends the provisions of Sections 37, 239, 240, 241, 780 and 782 of the *Companies Act* (Chapter 486 of the Laws of Kenya) and that the Plaintiffs have no locus in this case. That from the CR 12 details of Blue Ocean, Newton is a minority shareholder whereas Daniel is the majority shareholder but Newton has not filed a resolution from Blue Ocean or sought to leave of the court to continue with this suit as a derivative claim. It is indeed not in dispute that Newton is the minority shareholder whereas Daniel is the majority shareholder of Blue Ocean. From their plaint, it is evident that the Plaintiffs mainly allege wrongs committed against the company, Blue Ocean. It is trite that the proper Plaintiff in an action in respect of a wrong alleged to be done to a corporation is, prima facie, the corporation. However, there is an exception to this rule where what has been done amounts to fraud and the wrongdoers are themselves in control of the company. In this case the rule is relaxed in favour of the aggrieved minority, who are allowed to bring a minority shareholders action on behalf of themselves and all others. The reason for this is that, if they were denied that right, their grievance could never reach the court because the wrongdoers themselves, being in control, would not allow the company to sue (see *Foss v Harbottle* [1843] 2 Hare 461 and *Prudential Assurance Company Limited vs Newman Industries Limited and Others* [1982] 1 All E.R 364)
6. As Newton is a minority shareholder and he seeking redress on behalf of the company, Blue Ocean, against its majority shareholder, Daniel, I am inclined to agree with the Defendants’ Objection that they ought to have sought leave to proceed with this suit as a derivative action. However, the *Companies Act* makes it clear that even in circumstances where a suit has been filed without leave of the Court to commence a derivative action, leave of the Court can be sought after the filing of the suit with the aim of continuing with the suit as a derivative action. This position was succinctly addressed by the late



Onguto J., in *Ghelani Metals Limited & 3 others v Elesh Ghelani Natwarlal & another* [2017] KEHC 4629 (KLR) which has been cited by the Defendants as follows:-

With the advent of the Act, the law fundamentally changed. The requirement to fall under the exceptions to the rule in *Foss v Harbottle* was replaced with judicial discretion to grant permission to continue a derivative action. Judicial approval of the action is what now counts and such approval is based on broad judicial discretion and sound judgment without limit but with statutory guidance (Also see *Auto Japan (Mombasa) Limited v Malik Ali Zaka & 2 others* [2021] eKLR)

7. Therefore, whereas I am in agreement with the Defendants that the Plaintiffs ought to have sought leave to continue this suit as a derivative claim, I find that such leave can always be sought after the suit has been filed and the court will have discretion as to whether to allow such an application or not. I therefore find that it is not fatal for the Plaintiffs to have filed this suit first before the application for leave as the same can always be filed later. In any case, I am satisfied that the Plaintiffs have filed the suit herein with a view of safeguarding the interests of Blue Ocean and the confiscated goods which they claim belong to the Company. They also allege fraud on the part of the majority shareholder which underpins my finding that this claim is a derivative suit that Newton, as the minority shareholder, is entitled to pursue to safeguard the company from such alleged acts by majority shareholders.
8. Further, as Daniel is the majority shareholder, I find that it would be almost impossible to expect Newton, as the minority shareholder to obtain a Board resolution authorizing the filing of this suit on behalf of Blue Ocean. As it is clear to me that this is a derivative claim, I find that it is curable under Article 159(2)(d) of *the Constitution* to allow the suit to be deemed as properly filed as a derivative action and the Plaintiffs can continue with prosecution of the same (see *Joseph Munyoki Nzioka v Raindrops Limited & 3 others* [2019] KEHC 9387 (KLR)). For these reasons, the Defendants' Objection that the Plaintiffs have no proper locus before this suit has no merit and in summary, the Objection is hereby dismissed but with no order as to costs since there was no response to the same by the Plaintiffs.
9. Turning to the application that seeks an injunction and restitution of the confiscated goods, the parties agree that the three requirements the Plaintiffs have to satisfy in order to obtain the injunction were settled in *Giella v Cassman Brown & Co., Ltd.* [1973] E.A. 358 where the predecessor of the Court of Appeal held that a Plaintiff must demonstrate that it has a prima facie case with a probability of success, demonstrate irreparable injury which cannot be compensated by an award of damages if a temporary injunction is not granted, and if the court is in doubt show that the balance of convenience is in its favour. In *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2013] KECA 347 (KLR), the Court of Appeal reiterated these conditions and further clarified that they are to be applied as separate, distinct and logical hurdles which an Applicant is expected to surmount sequentially. This means that if the Applicant does not establish a prima facie case then irreparable injury and balance of convenience do not require consideration. On the other hand, if a prima facie case is established, then the court will consider the other conditions.
10. As to what constitutes a prima facie case, the Court of Appeal in *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* [2003] KECA 175 (KLR) explained that it is, "...a case in which on the material presented to the Court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party to call for an explanation or rebuttal from the latter." Thus, in order to succeed in getting an injunction, the Plaintiffs are expected to demonstrate that the confiscated goods belong to Blue Ocean and that they have rights over the said goods that require protection by the court.



11. However, going through the pleadings, I note that the Plaintiffs have not annexed any primary documents evidencing that Blue Ocean owns the said confiscated goods, choosing instead to annex a schedule of what they claim are the Blue Ocean's goods. This court has always held that Excel sheet schedules or tables do not amount to supporting documentation and that proof is only sufficient with primary documents (See *Commissioner Investigations and Enforcement v Kidero (Income Tax Appeal E028 of 2020)* [2022] KEHC 52 (KLR)). On the other hand, Daniel and Brand Track have annexed primary documents including receipts and invoices which on a prima facie basis, indicate that the goods belong to Brand Track. They have also annexed an email correspondence dated 14th November 2023 where Newton is offering to buy the machines from Daniel which fortifies the position that the same were never owned by the Plaintiffs.
12. The Plaintiffs have also admitted that the break in to confiscate the goods was in pursuance of a court order whose validity is not in dispute and the same has not been set aside. Whereas they challenge the manner in which the order was executed, I find that any loss suffered by the Plaintiffs as a result, can be ameliorated by an award of damages. It is also not upon this court to interrogate the merits of the said court order and whether Blue Ocean did indeed owe Brand Track a debt as that is a matter for an appellate or review court, which this court is not.
13. As the confiscated goods prima facie belong to the Brand Track and that they were confiscated based on a valid court order, it is my finding that the Plaintiffs have failed to demonstrate a prima facie case with a probability of success and the odds are stacked against them from obtaining the injunctive and restitution orders. In light of the dicta in the Nguruman Case (Supra), this marks the end of their inquiry for an injunction.

Conclusion and Disposition

14. For the above reasons, I find that the Plaintiffs' Notice of Motion dated January 30, 2024 is not merited and the same is dismissed with costs which shall be in the cause. The Interim Orders issued on January 31, 2024 are hereby vacated and/or discharged forthwith.

DATED, SIGNED and DELIVERED VIRTUALLY at NAIROBI on this 10th DAY of FEBRUARY 2025

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J.W.W. MONGARE
JUDGE

In the Presence of:-

1. Mr. Mabuka holding brief for Mr. Anguko for the Plaintiffs/Applicants.
2. Mr. Omollo holding brief for Mr. Makori for the 1st and 2nd Defendants.
3. Mr. Nyanjwa holding brief for Mr. Mumia for the 3rd Defendants.
4. Amos - Court Assistant

