



REPUBLIC OF KENYA



**Kinyanjui & 2 others v Mathu (Sued in His Personal Capacity and as the Administrator)
& 4 others (Civil Case 27 of 2020) [2025] KEHC 1323 (KLR) (24 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 1323 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL CASE 27 OF 2020
JM NANG'EA, J
FEBRUARY 24, 2025**

BETWEEN

**DAVIS NJENGA KINYANJUI 1ST PLAINTIFF
NJEMONI LTD 2ND PLAINTIFF
DANDORA MILLERS LIMITED 3RD PLAINTIFF**

AND

**DAVID KINYANJUI MATHU (SUED IN HIS PERSONAL CAPACITY AND AS
THE ADMINISTRATOR) 1ST DEFENDANT
FRECIA WANJIKU GATHOGO 2ND DEFENDANT
DAVID KINYANJUI MATHU 3RD DEFENDANT
JOYCE NYAMBURA NJENGA 4TH DEFENDANT
REGISTRAR OF COMPANIES 5TH DEFENDANT**

RULING

1. By a Notice of Motion dated 7th August 2024 the 1st defendant (“the Applicant”) craves reliefs as hereunder:-
 1. Spent
 2. That this Honourable Court be pleased to order that the board of directors of the affected parties be dissolved and, in its place an interim board be constituted to report to Court whenever called to do so and in the interim run the management of the companies.(sic)
 3. That this Honourable Court be pleased to issue order that any meetings whether general or special that may only be convened by the board of directors of Njemoni Limited and Dandora



Millers Limited upon prior and proper notification to all the directors/shareholders, and may proceed with the participation of all directors/shareholders at the said meeting pending hearing and determination of this Application and the main suit and counterclaim. .(sic)

4. That pending hearing and determination of this application, suit and counterclaim, this honourable court be pleased to freeze the affected parties bank accounts and all assets, revoke the current bank signatories and the interim board of directors to operate new accounts and act as signatories thereof. .(sic)
 5. Spent.
 6. That alternatively this Honourable Court do issue a temporary injunction restraining the 1st Plaintiff/Respondent and from acting as directors of the 2nd and 3rd Plaintiff (affected parties) pending the hearing and determination of this application, main suit and counterclaim. .(sic)
 7. That this Honourable Court be pleased to reverse the dilution of shares process that was approved by the Board of Directors in an unlawful, un-procedural and arbitrary procedure contrary to the Dandora Millers Limited Articles of Association.
 8. That the court be pleased to issue any other orders that may be deemed fit to issue during the hearing of the application and the suit.
 9. That the Respondents bear the costs of the application.
2. The application is supported by affidavit evidence of the Applicant who is the Administrator of the Estate of Monica Wangui Njenga (deceased)
 3. The 1st Plaintiff (“the Respondent”) opposes the application vide his affidavit in reply filed on 24th September 2024 or thereabouts.
 4. The Applicant avers that he is one of the shareholders of the 2nd Plaintiff Company and the legal representative of the estates of George Mathu and Monica Wangui who are deceased directors of the 3rd Plaintiff Company. The founders of the two companies are named as the said Monica Wangui Njenga and James Njenga Mathu (deceased). The 2nd and 3rd Plaintiffs were incorporated as trading and holding companies respectively.
 5. The Applicant further avers inter alia that the two companies’ shareholding structure has been changing from time to time. Following the death of the two founders of the companies, the Respondent is alleged to have perpetrated illegal, unprocedural, ultra vires and fraudulent actions in breach of the companies’ Articles of Association and the rights of members. In particular, the Respondent is claimed to have illegally fabricated Board Minutes in an unsuccessful attempt to allocate himself additional 300 shares in the 2nd Plaintiff Company. The attempt failed because the companies’ Registry alerted the other directors of the 2nd Plaintiff who indicated by affidavit evidence that they were unaware of the changes.
 6. Despite detection of the Respondent’s illegal activities, the Applicant contends that the Respondent continues to run the affairs of the companies without involving other directors. The Applicant continues to lament that the Respondent has been leasing and charging the 2nd Plaintiff’s assets and unlawfully transferring personal properties of James Njenga Mathu (deceased). The Respondent also allegedly unlawfully increased the nominal share capital and his shareholding in the 3rd Plaintiff through fabrication of minutes of a meeting that purportedly took place on 25th May 2004.



7. The Applicant further complains that the Respondent fabricated minutes of the 3rd Plaintiff's meeting to purport that the Estate of George Mathu resigned its directorship. As a result of the Respondent's alleged illegal activities, some directors of the subject companies could not receive their dividends. The Estate of the late George Mathu, especially, has not received any dividends from the 3rd Plaintiff for over 26 years, according to the Applicant.
8. The Respondent is said to persist in his irregular and illegal conduct despite protests, thus provoking this application.
9. The Respondent retorts through his affidavit in reply that the application is "spurious" as matters that occurred in 2004 and 2019 are brought up now yet this suit has been pending since 2020.
10. He refutes the Applicant's allegations and charges that the Applicant as well as the 2nd to 4th defendants are not legitimate and "bonafide" shareholders of the subject companies authorised under Company law to seek dissolution of Boards of the Companies. They are described as strangers to the 2nd and 3rd Plaintiff companies who are breaching the companies' Articles of Association to unlawfully come in as shareholders.
11. The Respondent further contends inter alia that the Applicant and his co-defendants unlawfully altered the share capital of the 2nd Plaintiff and transferred shares to themselves and that the matter is the substance of this suit. He distances himself from the Applicant's allegation that he forged minutes of a purported meeting of the 2nd Plaintiff to change its shareholding. The Respondent asserts that the said company resolutions were in fact prepared by the Applicant who forged his signature thereon and forwarded the same to the Companies' Registry. The court is told that the Applicant's alleged actions are also the subject of trial herein.
12. In respect to the Applicant's claim that he interfered with the structure of the 3rd Plaintiff's shareholding, the Respondent states that the Applicant had lodged the same complaint vide an application dated 17th July, 2020 in Nairobi which was rejected.
13. The Respondent therefore dismisses the Applicant's contentions, observing that the claims of fraud and illegalities can only be addressed through oral evidence of the parties and not by affidavit evidence.
14. The Applicant put in a Supplementary Affidavit in answer to the Respondent's evidence. Reiterating averments in his affidavit in support of the application, he maintains that he is a shareholder in the 2nd Plaintiff Company both in his individual capacity and as an Administrator of the Estate of Monica Wangui Njenga (deceased) who was one of the Company's directors. Regarding the 3rd Plaintiff company, the Applicant also underscores that he is a director (shareholder) thereof in his own capacity and as Administrator of the Estate of the said Monica Wangui Njenga.
15. The Applicant continues to traverse the allegation of forgery and all the other averments in the Respondent's Affidavit in a detailed further reply.
16. The 2nd, 3rd, 4th and 5th Defendants are not opposed to this application.
17. The Parties' Submissions on the application were superseded by cross examination of the Applicant on his Affidavit evidence by the Respondent's Advocate (Mr. Githui) upon leave of the court. The Applicant underscored his deposition. He added that the estate of the said Monica Wangui Njenga of which he is the Administrator was yet to be transmitted to beneficiaries. The deceased had also filed Civil Suit No. 25 of 2020 in this court praying for among other reliefs leave to prosecute the suit as a derivative claim. The Applicant confirmed that the suit was subsequently withdrawn. According to



the Applicant, the instant suit was instituted upon consent as a derivative suit. He, however, conceded that he did not know the meaning of a derivative suit.

18. The Applicant continued to insist that Monica Wangui Njenga (deceased) had transferred her shares in the two companies to him which transfer is disputed through this suit.
19. Upon further cross-examination by Mr. Githui, the Applicant denied having attended a Board Meeting he referred to in his affidavit supporting the application and stated that he got the minutes of the meeting from the Registrar of Companies.
20. The Applicant told the court inter alia that before shareholders transfer their shares notices have to be issued to all shareholders as stipulated in the concerned company's Articles of Association. He has never called for a meeting of the 2nd Plaintiff's shareholders. According to him the last meeting of the 2nd and 3rd Plaintiffs' shareholders was held in June 2020.
21. Learned Counsel for the Applicant and the Respondent filed Written Submissions which I have perused against the rival affidavit evidence and the record. Counsel for the Applicant submit that their client has locus standi to bring the application by dint of Section 238 of the Companies Act. The enactment defines a "derivative claim" to mean "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....."

22. To buttress this Submission, Counsel make reference to the judicial determination in *Nextgen Office Suites Ltd & Another vs Netcom Investments Limited & Another Shah Minakshi Navinhandra (Interested Party)* [2021] eKLR in which it was observed that a derivative action is brought by a company's Shareholder to redress a wrong done to the Company;

"as distinct from where shareholders wish to enforce their own personal shareholder rights, in which case they would have personal redress and would thus rely on a personal action rather than a derivative action."

In *Ghelani Metals Limited & 3 Others vs Elesh Ghelani Natwarlal & Registrar of Companies HCCC 102 of 2017* it was further noted inter alia that a derivative action;

is designed as a tool of accountability to ensure redress is obtained against all wrong doers, in the form of a representative suit filed by a shareholder on behalf of the Corporation."

23. The Applicant's advocates tell the court that by consent dated 8th April 2024 this suit was allowed to continue as a derivative suit. Subsequent thereto the Applicant put up a counterclaim seeking reliefs on behalf of the subject companies following a wrong done to the companies and not for his personal gain. The Applicant opines that by consenting to filing of the counterclaim the 1st Plaintiff effectively admitted his capacity to seek reliefs on behalf of the company which position cannot now be seen in this application to have been abandoned by the Applicant.
24. Regarding the orders he seeks in this application, the Applicant concludes that they are conservatory in nature and would in effect injunct the Respondent in operating the 2nd and 3rd Plaintiffs. Citing the famous Court of Appeal decision in *Nguruman Limited vs Jan Bonde Nielsen & 2 Others* (2014) eKLR, the Applicant's advocates state three requirements that have to be satisfied before grant of an interlocutory injunction;
 - a. The Applicant has to establish a prima facie case.



- b. He/she must demonstrate that irreparable injury will result if a temporary injunction is not granted
and
- c. If the court is in doubt it will determine the application on the basis of the balance of convenience.
25. Counsel further cite case law in *Mrao vs First American Bank of Kenya Limited & 2 Others* (2003) eKLR for the definition of a prima facie case in civil cases to wit;
- “A case which on the material presented, the court or tribunal properly directing itself will conclude that there exists a right which had apparently been infringed by the opposite party as to call for explanation or rebuttal from the latter.”
26. The Applicant attacks the Respondent for unilaterally running the affairs of the subject companies contrary to the relevant Articles of Association which require that at all times the business of the companies shall be operated by a minimum of 2 and a maximum of 7 directors. Reliance in this regard is placed on the case of *Okiya Omtatah Okoiti & 3 Others vs Nairobi City County & 5 Others* (2014) eKLR in which it was opined that the Articles of Association of a company should prevail over statutory provisions in relation to appointment of company directors.
27. The Applicant therefore contends that by running the companies alone the Respondent has breached his fiduciary duty owed to other shareholders. The Respondent’s activities would cause irreparable loss to other shareholders if the orders sought herein are not granted, argue Counsel. Further quoting the case of *Paul Gitonga Wanjau vs Gathuthi Tea Factory Company Limited & 2 Others* (2016) eKLR, Counsel submit that irreparable injury is one that is substantial and cannot be adequately remedied by damages, and even where damages, are an adequate remedy, injunction may still issue if the act in respect of which relief is sought is likely to destroy the subject matter in question.
28. Learned Counsel for the Respondent’s rejoinder is that the Applicant is wrongly inviting the court to determine substantive issues relating to management of companies, for instance corporate structure and shareholding, at an interlocutory stage of proceedings. The court is referred inter alia to the judicial decision in *Samwel Gutu Macharia & 4 Others vs Patrick G. Mwangi & 7 Others* (2017) eKLR in which was held that courts would only interfere upon a strong case of fraud or ultra vires which is pleaded, proved or admitted and which cannot be rectified in a general meeting.
29. In their opinion, the Respondent’s Counsel think that the reliefs the Applicant seeks in this application are substantially in the nature of mandatory injunction. The Court is also told that it is common ground that the orders that the Applicant craves are for the benefit of the 2nd and 3rd Plaintiff companies and that the Application is founded on the defendant’s counterclaim herein. The Respondent however, takes issue with the Applicant describing the 2nd and 3rd Plaintiffs as “affected parties” in the counterclaim. The Applicant’s locus standi to bring this application is therefore challenged.
30. While generally seeming to agree with the Applicant’s Submissions on the meaning of a derivative suit or claim, Counsel for the Respondent submit that for a shareholder to proceed with a suit as a derivative suit an application for leave has to be made. (See Section 239 of the *Companies Act* quoted by Counsel and which gives the court jurisdiction to grant or decline such leave). The Respondent argues that it is the grant of leave that gives a shareholder locus standi to file suit for the benefit of and in the interest of the company. It is contended that the Applicant never sought and obtained permission to bring the counterclaim, which in law is in the nature of cross suit against the 2nd and 3rd Plaintiffs herein he only



describes as “affected parties”. The Respondent suggests that one of the reasons for the requirement for leave to institute a derivative suit is to avoid multiplicity of suits by shareholders purportedly to protect the interests of the same company.

31. The Respondent therefore submits that the Applicant has no locus standi to bring this application and the counterclaim for want of permission from the court.
32. Regarding the merits of the application, the Respondent’s advocates contend that the Applicant has not made out a case for grant of mandatory injunction mainly sought in the instant application. It is submitted that a mandatory injunction is not usually granted at the interlocutory stage of proceedings unless the application demonstrates special circumstances warranting such injunction (see the popular case of Kenya Breweries Limited vs Washington Okeyo (2002) eKLR Counsel rely upon to support this argument). For the order to issue, it should be shown that the case before the Court is a simple one that can be determined in a summary manner or that the Respondent is attempting to steal a march on the Plaintiffs. Superior Courts have held that these stringent conditions are necessary because a mandatory injunction has the effect of determining the contested issues with finality at the interlocutory stage.
33. Prayer (4) of the application is said to be a Mareva injunction which is a freezing order intended to restrain a person from dissipating or wasting an asset, directly or indirectly, or removing property in dispute from the jurisdiction of the court. According to the Respondent, Mareva injunction is not an interim order and applicable principles guiding grant of the order are distinct from those relating to temporary injunction.
34. In the circumstances of this case, Counsel for the Respondent therefore submit that the Applicant has not made out a prima facie case for grant of any temporary relief. Neither has he demonstrated that he and his co-defendants would suffer irreparable injury if the orders prayed for are not granted, according to Counsel.
35. The Applicant has also filed what are described as “Applicant’s Supplementary Written Submissions”. The brief Submissions reiterate the same factual position elucidated in the Applicant’s affidavit evidence.
36. The following two points arise for determination in this application;-
 - a. Whether the Applicant has the necessary locus standi to bring his counterclaim and the application under consideration.
 - b. The orders commending themselves to the court on the facts and in the circumstances of this case.
37. It is common ground and it is also the legal position that by dint of Section 239 of the *Companies Act* leave of the court for a shareholder to continue a suit as a derivative suit is mandatory. It does not require painstaking research to hold that a counterclaim is a suit that is independent of the main claim and so the provisions of Section 239 of the Act apply to a counterclaim as well. The Applicant was especially required to obtain leave to institute the counterclaim given that the Respondent has already filed this derivative suit in the interests of the same companies.
38. The Applicant appears to explain the apparent anomaly by stating that the parties had consented to this suit being a derivative suit upon which he was allowed to file an amended defence in which he included the counterclaim. He contends that the Respondent cannot now turn around to question his capacity to seek reliefs on behalf of the companies through the counterclaim.
39. The record shows that the consent alluded to hereinabove was preceded by withdrawal of the Applicant’s Civil Suit No. 25 of 2020 in which he among other reliefs sought leave to continue with



the suit as a derivative claim. He then filed a counterclaim in this suit purporting to seek remedies on behalf of the 2nd and 3rd Plaintiffs without the leave of the court.

40. On the material on record, the court accordingly finds and holds that the Applicant has no locus standi to prosecute his counterclaim for want of the court's permission as required in law. The issue is not his right to fight for the interests of the companies but rather whether he sought and obtained the requisite leave.
41. The foregoing finding is sufficient to dispose of this matter because the application cannot stand without the counterclaim which does not even refer to the 2nd and 3rd Plaintiffs as substantive parties but "affected parties". If only for academic purposes, however, I will comment on the merits of the reliefs sought. Except for prayers 4 and 6 of the application for Mareva injunction and an alternative temporary injunction respectively, I agree with the Respondent that the rest of the reliefs sought are in the nature of mandatory injunction. The principles guiding determination of injunction applications including mandatory, prohibitory and permanent injunctions were long settled in the often quoted case of *Giella vs Cassman Brown & Company*. The principles are;

"Firstly, 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."
42. The three limbs are to be surmounted sequentially (see *Nguruman Limited vs Jan Bonde Nielsen & 2 Others* [2014] eKLR). This means that the Applicant has to satisfy each of the three elements to obtain injunction orders.
43. The Applicant is alleging fraud in the Respondent's management of the 2nd and 3rd Plaintiff companies by inter alia forging minutes of purported Board Meetings to increase his shareholding. The Respondent is also accused of convening meetings of the 2nd and 3rd Plaintiffs in breach of their Articles of Association and excluding the Applicant from the affairs of the companies, as well as unilaterally charging and leasing company assets.
44. The Respondent vehemently denies the alleged fraud and illegalities. The facts set out in the affidavit evidence are therefore hotly contested.
45. I find no exceptional or special circumstances warranting orders of mandatory injunction at this interlocutory stage as prayed. The Applicant has not also shown a prima facie case for grant of the alternative prayer of temporary injunction in the circumstances of this case. For instance there is no clear evidence that the Respondent is charging or leasing company property. What is on record is the word of one party against that of the other.
46. The allegations the parties make in the application ought to be ventilated by oral evidence at trial and not through affidavits.
47. As regards the freezing order which I agree with the Respondent to amount to a plea for a Mareva injunction, there is no evidence that the 2nd and 3rd Plaintiffs' assets are being dissipated, wasted or otherwise removed from the jurisdiction of this Court. Again I am unable to find that the Applicant has made out a prima facie case for grant of this order.
48. In the end, I would find that the Applicant has not established a prima facie meriting the orders sought in the application.



49. The Applicant has not further shown that he would suffer irreparable loss if the orders are not issued. Any loss he suffers and he eventually succeeds in the suit can be ameliorated by costs and/or damages.
50. In light of the Court's findings on the first and second limbs of *Giella vs Cassman Brown & Company supra*, it is necessary to determine in whose favour the balance of convenience tilts to.
51. This application is therefore dismissed in its entirety and the costs thereof shall be in the Cause.

J. M. NANG'EA, JUDGE.

RULING DELIVERED VIRTUALLY THIS 24TH DAY OF FEBRUARY, 2025 IN THE PRESENCE OF:

Mr. Machoka Advocate for Mr. Githui Advocate for the Plaintiffs

Mr. Muriithi Advocate for Mr. Kisilah Advocate for the 1st Defendant

2nd – 4th Defendants' Advocate, Absent

5th Defendant's Advocate, Absent

Court Assistant (Jeniffer)

J.M. NANG'EA, JUDGE.

