



REPUBLIC OF KENYA



**KENYA LAW**  
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**Muchiri v Board of Management of the Kenya Hospital Association & another;  
Kenya Hospital Association (Interested Party) (Commercial Case E081 of 2025)  
[2025] KEHC 3564 (KLR) (Commercial and Tax) (24 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 3564 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL CASE E081 OF 2025  
PM MULWA, J  
MARCH 24, 2025**

**BETWEEN**

**SAMUEL MITHAMO MUCHIRI ..... PLAINTIFF**

**AND**

**THE BOARD OF MANAGEMENT OF THE KENYA HOSPITAL  
ASSOCIATION ..... 1<sup>ST</sup> DEFENDANT**

**PROF GITHU MUIGAI, SC, DR JANE NYAKANGO, PROF DONALD ORINDA,  
DR MESHACK ONGURI & CECILIA NGALYUKA (SUED AS THE TRUSTEES  
OF THE KENYA HOSPITAL ASSOCIATION ..... 2<sup>ND</sup> DEFENDANT**

**AND**

**THE KENYA HOSPITAL ASSOCIATION ..... INTERESTED PARTY**

**RULING**

### **Introduction and background**

1. Before the court for determination is the application dated 7<sup>th</sup> February 2025 made under sections 30, 239 and 240 of the *Companies Act* (Chapter 486 of the Laws of Kenya), sections 1A, 1B, 3A and 63 (e) of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya), Order 40 Rules (1)(2)(3)(4) and Order 51 Rule 1 of the Civil Procedure Rules where the Plaintiff seeks the following orders:
  1. Spent
  2. Spent
  3. Spent



4. Spent
5. Spent
6. Spent
7. Spent
8. That leave be and is hereby granted to the Plaintiff to continue this suit as a derivative suit on behalf of the Interested Party against the Defendants.
9. That a temporary order of injunction be and hereby issued suspending the implementation of the Resolutions on election of Directors of the Board of Management and of election of Trustee of the Kenya Hospital Association of 4<sup>th</sup> December 2024, pending hearing and determination of the suit or until further orders of the Honourable Court.
10. That a temporary order of injunction be and is hereby issued restraining the 1<sup>st</sup> Defendant, whether by itself, agents, employees or anybody whosever acting on the 1<sup>st</sup> Defendant's behalf from borrowing for any Capital Expenditure for the Interested Party, Kenya Hospital Association, and or offering, executing or in any manner whichsoever using the assets of the Interested Party as collateral for a loan, pending hearing and determination of the suit or until further orders of the Honourable Court.
11. That a temporary order of injunction be and is hereby issued restraining the 1<sup>st</sup> Defendant, whether by itself, agents, employees or anybody whosever acting on the 1<sup>st</sup> Defendant's behalf from engaging in any form of Capital Expenditure, including equipment purchase, furniture and fittings, upgrade and maintenance of physical assets such as property, plants, buildings, technology, or equipment, settling pending bills, spending on any new procured projects, any ongoing projects, and undertaking new projects or investments, pending hearing and determination of the suit or until further orders of the Honourable Court.
12. That a temporary order of injunction be and is hereby issued restraining the 2<sup>nd</sup> Defendant, whether by themselves, agents, employees or anybody whosever acting on their behalf from in any manner whichsoever offering and or using the assets of the Interested Party, Kenya Hospital Association as collateral for a loan, pending hearing and determination of the suit or until further orders of the Honourable Court.
13. That a temporary order of injunction be and is hereby issued restraining the 1<sup>st</sup> Defendant, whether by itself, agents, employees or anybody whosever acting on the 1<sup>st</sup> Defendant's behalf from floating or concluding any procurement of Capital services and Projects pending hearing and determination of the suit or until further orders of the Honourable Court.
14. That a temporary order of injunction be and is hereby issued restraining the 1<sup>st</sup> Defendant, whether by itself, agents, employees or anybody whosever acting on the 1<sup>st</sup> Defendant's behalf from liquidating, encashing, or in any manner whatsoever utilizing or applying the funds belonging to and held by the Interested Party, Kenya Hospital Association, in Fixed/Call Deposits, Treasury Bonds, Infrastructure Bonds and Provident Fund, and or where liquidated from applying funds therefrom, wherever held, pending hearing and determination of the suit or until further orders of the Honourable Court.
15. That a mandatory order of injunction be and is hereby issued compelling the 1<sup>st</sup> Defendant to, within seven (7) days of service of the Order, avail to the Plaintiff the index and Register of members of the Interested Party, Kenya Hospital Association as of 30<sup>th</sup> July 2024, and as of



4<sup>th</sup> December 2024, as obligated by Section 96 and 97 of the *Companies Act*, Chapter 486 of the Laws of Kenya.

16. That a Mandatory Order of injunction be and is hereby issued compelling the 1<sup>st</sup> Defendant to, within seven (7) days of service of the Order, to avail to the Plaintiff Notice of Convening Board Meeting and Minutes of Board Minutes of the Board of Management of the Interested Party that vetted and approved any members of the Interested Party from 1<sup>st</sup> August 2024 to 4<sup>th</sup> December 2024.
17. That costs of the application be borne by the Defendants.
2. This application is grounded on facts set out on its face and the supporting affidavit of the Plaintiff sworn on 7<sup>th</sup> February 2025. It is opposed by the 1<sup>st</sup> Defendant (the Board) through the replying affidavit of its vice chairperson, Samson Mbuthia Kinyanjui, sworn on 18<sup>th</sup> February 2025 and the grounds of opposition dated 18<sup>th</sup> February 2025. It is also opposed by the 2<sup>nd</sup> Defendant (the Trustees) through the replying affidavit of Dr. Meschach Ong’uti sworn on 17<sup>th</sup> February 2025 and the grounds of opposition dated 18<sup>th</sup> February 2025. The Interested Party (the Hospital) has also responded through the affidavits of its Company Secretary, Gilbert Nyamweya, sworn on 19<sup>th</sup> February 2025 and 27<sup>th</sup> February 2025. The application was disposed by way of written and oral submissions by the parties’ respective counsel.
3. The Plaintiff’s case as set out in his application is as follows: The Hospital, going by the trading name, The Nairobi Hospital, is a leading healthcare facility in Kenya, providing general and specialized healthcare services to citizens of Kenya and Eastern Africa. That the Hospital accordingly occupies a uniquely critical and important role, though not a parastatal of the Government, it is a national institution, whose operations resonate with public interest and that its optimal functioning is accordingly a matter of great public interest. The Hospital is managed by the Board who ideally are to manage the Company in full deference to the law, the Articles and for optimal achievement of the Objects of incorporation borne in the Memorandum of Association.
4. The Plaintiff contends that there subsists serious breaches and default by actionable commissions of the Board of the Hospital, so egregious that has now constrained the present action to protect the interests of the Hospital, to literally save it from a total shut down/insolvency, as a result of unprecedented loss, pilferage, asset hemorrhage, the worst form of governance and management since incorporation of the Hospital in 1952. The Plaintiff accuses the Board of violating sections 95, 96 and 97 of the *Companies Act* and the Articles of Association, with respect to the membership and the member Register. That it has failed to file with the Registrar of Companies the updated index of Register of members, and has declined to allow the members of the Hospital an opportunity to inspect the Register and or make copies, thereby committing criminal offences under the Act.
5. The Plaintiff claims that the Board has further purported to register new members of the Hospital, in serious contravention of the mandatory provisions of Article 8 of the Articles of the Hospital and that it has committed and continues to commit serious acts of malfeasance in breach of the duty to act for success of the Hospital and duty to exercise reasonable care, skill and diligence, as obligated by provisions of sections 143 and 145 of the *Companies Act*, with the consequence that the Hospital now has a loss/deficit amount of Kshs. 1,155,329,000.00, with a debt to suppliers of nearly Kshs. 3 billion. He further claims that the Defendants intend to borrow off shore, the sum of Kshs. 4.2 billion, using assets of the Hospital as collateral, which demonstrates imprudence that will drive the Hospital to insolvency.



6. The Plaintiff reiterates that the Board has engaged and continues to engage in serious acts of malfeasance and breach of fiduciary duty to avoid conflict of interest, which is in contravention of provisions of section 146 of the *Companies Act* and Article 63 (a) and (b) of the Hospital's Articles of Association and this fiduciary breach has caused serious pilferage and mismanagement of its resources, including settlement of unverified, unaudited inflated legal fees aggregating over Kshs. 500 million in 2024, debt to suppliers amounting to over Kshs. 3 billion, and a deficit amounting to Kshs. 1,155,329,000.00 for the year 2024, a clear indication that the Hospital is in the wrong hands and if left unchecked, the Board shall drive the Hospital to the ground. The Plaintiff adds that the Board, in serious breach of fiduciary duty, presided over the Annual General Meeting of the Hospital of 4<sup>th</sup> December 2024, in contravention of provisions of the *Companies Act* and Articles of Association, which deficiency in law renders the Resolutions of the impugned General Meeting fatal, and invalid.
7. The Plaintiff states that the above issues have constrained him as member of the Hospital to invoke the jurisdiction in section 239 of the *Companies Act*, a derivative suit, to protect the interests of the Hospital. The Plaintiff proffers that the matters above are extremely urgent and cannot await conclusion of the suit and that they are prima facie serious issues, with serious merits. That damages cannot be adequate, when the Hospital becomes insolvent, or becomes committed to liability too astronomical and beyond redemption. Finally, that the balance of convenience is no doubt in favour of preservation of the subject matter of litigation, by way of injunction and that unless the Court intervenes as prayed for in the application, the Hospital and its members will suffer irreparable harm, including financial ruin, loss of public trust, and operational collapse. As such, the Plaintiff states that the facts of this case also posit exceptional circumstances to warrant the grant of orders for temporary mandatory injunction and that it shall no doubt be in the interests of justice to grant the reliefs of the application.
8. In response, the Defendants first assail the competence of the application on various grounds. First, that the supporting affidavit accompanying the application is not dated thus offending the provisions of the *Oaths and Statutory Declarations Act* (Chapter 15 of the Laws of Kenya) and that another affidavit filed in attempt to cure this anomaly was done without the leave of court. Second, that the issues raised in the application are res sub judice and res judicata HCCOMM E233 of 2024 and HCCOMM E544 of 2024 which matters have been and are still being litigated upon. On the competence of the application, the Defendants depone that the Plaintiff's counsel has mischaracterized the interim orders granted him and that his conduct negates all the aspects of good faith and he has resorted to directly use these Court's orders to instigate a malicious mud-slinging campaign against the Board. The Defendants state that granting the orders sought by the Plaintiff have the effect of crippling the operations of the Hospital whose optimal functioning is accordingly a matter of public interest. That the Board and the Hospital have been involved in protracted legal battles arising from the attempt of a hostile takeover by some members who illegally requisitioned a meeting for the removal of the Board which attempt was thwarted following the orders of this Court allowing the elections to be conducted on 4<sup>th</sup> December 2024 at the Hospital's AGM.
9. The Defendants accuse the Plaintiff of using the "backdoor" to bypass the legal requirements and obligations imposed by Article 48 of the Hospital's Articles on the correct procedure of removing directors. That by dint of applying to this Court for the suspension of the resolution passed during the said AGM on election of Directors of the Board and of election of Trustees of the Hospital, one cannot help but draw the conclusion that the Plaintiff is serving the masters of the requisition in HCCOMM E544 of 2024 in pursuit of selfish interests. The Defendants aver that the said resolution has already been implemented and as such, the injunctive and derivative prayers sought have been overtaken by events and that the Plaintiff has not demonstrated exceptional circumstances for the grant



of the mandatory orders sought. Further, that the order for release of the register of members is directly and substantially in issue and is res sub judice HCCHRPET E361 of 2024, which petition is in a court of equal status to this Court.

10. The Defendants state that the Plaintiff is giving his opinion on how to manage the Hospital with no backing of credible sources and/or data and that he is merely sensationalizing the matter by attempting to hide under bulky documents given that he has not demonstrated that the provisions of the Supply Chain Manual were contravened and has merely attached the manual with no corresponding evidence that the alleged intended borrowing of the supposed Kshs. 4.2 billion flouted the Supply Chain Manual.
11. The Defendants claim that the Plaintiff is clearly not interested in the progression of the Hospital as the Kshs. 4.2 billion will have more than half of it allocated to medical equipment replacing old and outdated equipment that manufacturers have since ceased offering support and servicing of parts; for example, the Hospital's Linear Accelerator which is used to provide cancer treatment services and was acquired in 2012 and is no longer supported by the vendor as it has reached its mechanical 'End-of-Life'. That with new equipment, there shall be a guaranteed return on investment given that the Hospital will generate revenue from their usage and most importantly offer its patients safety and quality healthcare.
12. That some of the new medical equipment being the MRI Machine and CT Scan machine are already underway in terms of fulfilling the tenders floated and awarded and that injuncting the Hospital from utilizing the intended Kshs. 4.2 billion to pay for the machines will expose the Hospital to legal liability running to the hundreds of millions which the Defendant doubt the Plaintiff will compensate the Hospital if the suit is not found to be with merit. The Defendants urge that this Court will appreciate the fact that the Hospital, having more than 8,000 members cannot implement 8,000 different views on one subject matter to generate 8,000 results but the Board has the obligation to make one decision in the best interests of the Hospital in line with its mission and vision.
13. The Defendants contend that by accepting the invitation by the Plaintiff to stop the developments already underway for the betterment of the Hospital to provide first class health-care facilities for the general public, this Court will be countenancing the Plaintiff's way or the highway mentality that is meant to stagnate any development in an effort to create unwarranted unrest amongst the Hospital's 8000 members and its staff. For instance, that the completion of a satisfactory Labour Ward is necessary to accomplish the Hospital's standards as well as the clinical requirements as opposed to the Plaintiff's self-imposed standards. The Defendants add that the issue of borrowing the Kshs. 4.2 billion was raised by an application in HCCOMM E233 of 2024 but the application was dismissed and the defendants therein did not prefer an appeal. The Defendants thus state that the balance of convenience in terms of who stands to suffer in the event temporary orders under prayer numbers 3, 4, 5, 6, 10, 11, 12 and 13 are granted tilt in favor of the Hospital.
14. The Defendants accuse the Plaintiff of misleading the court in that his annexure being the alleged financial reports detailing legal expenditure do not disclose the maliciously alleged legal fees of over Kshs. 500 million and a closer inspection of the schedule attached shows over Kshs. 200 million being Decretal Amounts held in Escrow funds. In any event, that the financial statements for the year 2024 have not been audited and the figures appearing therein are not from the Hospital. That it is not true that senior management and heads of departments left the Hospital employment under unclear circumstances and that the Plaintiff has not tabled any evidence in the form of resignation or termination letters which are a standard issue to any employee leaving employment.



15. The Defendants further contend that the allegation that members of the Board are directly acting in conflict of interest is also not substantiated and on the conduct of the AGM, they depone that indeed there was a hybrid meeting where participants were able to attend the meeting both online and physically and pursuant to the Court orders issued on 4<sup>th</sup> November 2024, the Defendants were keen to comply with the said orders by having a peaceful and well-coordinated meeting. That in the course of the meeting, a handful of members begun causing mayhem by shouting and interjecting the flow of the meeting in what was a badly orchestrated attempt to ensure the meeting did not proceed. Noticing that no attention was being given to their heckling, the members walked out and proceeded to the Atrium to have lunch leaving the meeting in progress.
16. The Defendants deny the allegation of a document circulated to members of the Hospital and instructions on 'How to Vote.' That one can clearly see that the annexure is a PDF generated and has markings which were not on the original document; that is to say the markings are imposed by a computer over the original documents specifically the "check" marks and the title "HOW TO VOTE" which is unethical behavior of misusing technology to generate fake evidence. That the only emails sent to members on 4<sup>th</sup> December 2024 consisted of 2 emails being; An email informing members that the portal had been opened for voting (and did not contain an attachment in the form of any document but a web page link sending the member directly to the specific online voting platform) and an email informing and communicating to members that the AGM would be held virtually and physically, to confirm their attendance if not pre-registered, of the website link designed to train the member on how the online voting mechanism works and a link provided to access documents necessary for information on the AGM being an AGM Notice, Annual Reports and Financial Statements 2023, Notification of the Date for the Conduct of the AGM and 2023 AGM Minutes.
17. As such, the Defendants assert that the document annexed by the Plaintiff to demonstrate the imagined malfeasance is a creature of the Plaintiff meant to deceive the Court. In any event, the Defendants state that the conduct of the voting that happened in the AGM is subject of a pending application in HCCOMM E544 of 2024 where the Hospital has via an affidavit provided a report over the AGM to the Court and defendants therein for satisfaction that the AGM was conducted freely and fairly. On the issue of registration of members, the Defendants state that the Hospital has adopted a one-stop inclusive approach to recruit and admit new members. One needs to fill a form and seek the seconding of two fully paid-up members of the Hospital. That it is therefore clear that the Plaintiff is not up to speed with the registration requirements which have been in operation for quite a while now.
18. The Defendants contend that the Court cannot grant permission for continuation of a derivative suit if it is satisfied that an act or omission from which the cause of action arises that has already occurred was authorized by the company before it occurred; or has been ratified by the company since it occurred. In sum, the Defendants depone that the Plaintiff is a pawn being used by a handful of the Hospital's members to institute the instant suit so as to convolute and destabilize the functions of the Hospital without giving regard to the fact that the Hospital is in the healthcare industry and their actions if allowed will have a huge impact on the services, efficiency and image of the Hospital which the Board has a duty to uphold. That the application before the Court does not meet the threshold for justiciability, in that it is not ripe for determination, as far as granting of any other order save for an order allowing the continuation of the suit as a derivative suit is concerned. That the application is incompetent and the granting of any temporary orders before the determination of whether the Plaintiff is to continue with the suit as a derivative action is bad law. For these reasons, the Defendants urge the court to dismiss the application with costs.



19. The Hospital's position is similar to that of the Defendants taken above and therefore, I do not find it necessary to rehash the same but I will make relevant references in my analysis and determination below.

### **Analysis and determination**

20. I have gone through the application, the rival depositions and submissions of the parties. The Defendants have raised technical and preliminary issues that impeach the competence of the suit and the court's jurisdiction. Therefore, I propose to first deal with them before determining the merits of the applications, if at all. First, is the competence of the Plaintiff's deposition that is undated. Whereas the Plaintiff admits that this was a regrettable mistake, he submits that a dated one has since been uploaded and that no prejudice has been suffered by the Defendants. On their part, counsel for the Board submitted that this affidavit was filed and uploaded without the leave of court. In seeking the court to strike out the undated deposition, the Defendants relied on the Supreme Court's decision in *Konchellah v Sunkuli & 2 others* [2018] KESC 58 (KLR). Going through that decision I note that the deposition therein was considered fatally defective as it was neither signed, dated nor commissioned. I find that case to be distinguishable from the present one as the Plaintiff's deposition herein is signed and commissioned. What is missing is the date and I am persuaded by the Plaintiff's submission that such an un-dated affidavit is a curable technicality which courts should not place undue regard to as espoused by Article 159(2) of *the Constitution*.
21. The Court of Appeal in *Kenneth K. Mwangi v City County of Nairobi & 2 others* [2017] KECA 434 (KLR) stated, "whereas section 5 of the *Oaths and Statutory Declarations Act* is couched in mandatory terms, the advent of the current constitution as well as the overriding objective and or oxygen principles that now compel courts to look more to the substance of the case as opposed to technicalities." As the Plaintiff has filed rectified the mistake by uploading the signed, dated and commissioned affidavit and since the parties have argued out its merits, I find that no prejudice has been suffered by the Defendants and none will be suffered if the court is to determine its merits as well.
22. The Defendants have also claimed that some of the issues raised by the Plaintiff are res sub judice and res judicata HCCOMM E544 of 2024, HCCOMM E233 of 2024 and HCCHRPET E361 of 2024. From the Plaintiff's Complaint of HCCOMM E544 of 2024 (annexed), it shows that the same is in respect of the Hospital fighting off a planned requisition by the defendants therein for an Extra Ordinary General Meeting of the Hospital. The requisition therein sought the removal of the Board's directors for various reasons. It is common ground that the requisition and call for the Extra Ordinary Meeting was stayed in favour of the Hospital holding the AGM on 4<sup>th</sup> December 2024 and a report on the same has been filed in court. It therefore follows that any issue arising out of the AGM is best to be determined in that suit and not in a separate suit. This also goes to the issues raised in the said requisition of the suit in HCCOMM E544 of 2024. The same cannot be the subject of proceedings in this suit as this will obviously offend the doctrine of res sub judice.
23. Going through the plaintiff and the present application, it is clear that the issues now being raised by the Plaintiff are consequent to the AGM that was conducted on 4<sup>th</sup> December 2024. The Plaintiff is challenging the manner in which the AGM was conducted and the resolutions taken thereof together with their effects. In my view, these are issues that will best be determined by the court in HCCOMM E544 of 2024 as the outcome and report of the AGM is before that court. The Plaintiff also seeks the removal of the directors of the Hospital, a matter that is directly in issue in the Requisition that gave rise to HCCOMM E544 of 2024.



24. The concept of sub judice is that where an issue is pending in a court of law for adjudication between the same parties, any other court is barred from trying that issue so long as the first suit goes on. In such a situation, an order is passed by the subsequent court to stay the proceedings and such order can be made at any stage. In determining whether or not sub judice applies, it is the substance of the claim that ought to be looked at rather than the prayers sought. I find that the pith and substance of this suit is wholly identical to the earlier suit, HCCOMM E544 of 2024.
25. It will be untidy for the court to consider the outcome of the AGM both in this suit and the earlier suit as there is a great risk of coordinate courts granting conflicting orders. I also note that the issue of the Kshs. 4.2 billion borrowing that has now been raised by the Plaintiff herein was a matter in issue in HCCOMM E233 of 2024 where the court (Dr. Mugambi J.,) held that this issue would best be raised and addressed in HCCOMM E544 of 2024.

### **Conclusion and disposition**

26. It is for the above reasons that I reserve my comments on the merits of this case and find that the issues herein are similar and are likely to be raised in HCCOMM E544 of 2024. Taking into account the import and tenor of the provisions of section 6 of the *Civil Procedure Act*, and the fact that this court is the one ceased of HCCOMM E544 of 2024, I hereby proceed to decree that the instant matter be mentioned alongside HCCOMM E544 of 2024 for possible consolidation and expedited hearing and determination. And considering the nature of the dispute, each party shall bear its own costs of this application. The interim orders in place are hereby discharged.

**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 24<sup>TH</sup> DAY OF MARCH 2025.**

**PETER M. MULWA**

**JUDGE**

In the presence of:

Mr. Nelson Havi for Plaintiff

Mr. Mong'eri & Mr. Kinyanjui for 1<sup>st</sup> Defendant

Mr. Ogejo & Ms. Kwamboka for 2<sup>nd</sup> Defendant

Ms. Muyoka & Dr. Okubasu for Interested Party

Court Assistant: Carlos

