



Mukirae v Atateb Medical Technologies Kenya Limited & another (Commercial Petition E005 of 2023) [2025] KEHC 3828 (KLR) (Commercial and Tax) (14 March 2025) (Ruling)

Neutral citation: [2025] KEHC 3828 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL PETITION E005 OF 2023
MN MWANGI, J
MARCH 14, 2025
IN THE MATTER OF ATATEB MEDICAL TECHNOLOGIES KENYA LIMITED
-AND-
IN THE MATTER OF SECTIONS 780, 782, 1002 AND 1004 OF THE COMPANIES ACT 2015

BETWEEN

JANE WAMORO MUKIRAE PETITIONER

AND

ATATEB MEDICAL TECHNOLOGIES KENYA LIMITED 1ST RESPONDENT

ANDREW NGURE GATHIMBA 2ND RESPONDENT

RULING

1. The petitioner filed a Notice of Motion application dated 28th February 2023 pursuant to the provisions of Order 40 Rules 1(a) & 4 and Order 51 of the *Civil Procedure Rules*, Sections 780, 782, 1002 & 1004 of the *Companies Act*, 2015, Sections 1A, 1B & 3A of the *Civil Procedure Act* and all other enabling provisions of the law. The petitioner prays for orders of temporary injunction restraining the respondents from registering or enforcing a special resolution that removed the petitioner as a Director of the 1st respondent and preventing the 2nd respondent from accessing, dealing with, or tampering with NCBA bank account number [particulars withheld] belonging to the 1st respondent, pending the hearing and determination of this petition.
2. The application is premised on the grounds on the face of the Motion, and it is supported by an affidavit sworn on the same day by Ms Jane Wamoro Mukirae, the petitioner herein and a Director and Shareholder of the 1st respondent. She averred that she has significantly contributed to the 1st respondent's operations by securing licenses, clients, and investors. Further, that she advanced



- substantial personal and investor funds to the 1st respondent amounting to over Kshs.41,000,000/=, which sum remains unpaid. She contended that the 2nd respondent has been running the 1st respondent in an oppressive manner, and he has excluded her from its management and financial decisions.
3. Ms Mukirae alleged that the 2nd respondent unlawfully accessed and misappropriated funds from the 1st respondent's NCBA bank account. She stated that she was improperly removed as a signatory to the 1st respondent's bank account without due process and a Special General Meeting was convened on short notice, on 8th February 2023, to remove her as a Director of the 1st respondent, thereby denying her a fair hearing or chance to respond. She asserted that the removal process was conducted in bad faith, violating legal provisions under the *Companies Act* and the *Constitution*.
 4. In opposition to the application, the respondents filed a replying affidavit sworn on 17th April 2023 by Mr. Andrew Ngure Gathimba, the 2nd respondent herein and a Director, and majority shareholder of the 1st respondent. He averred that the petitioner's claims have been overtaken by events, as she was removed as a Director of the 1st respondent through a properly conducted Special General Meeting on 10th February 2023, and thereafter the resolution was lodged with the Registrar of Companies on 1st March 2023. He claimed that the petitioner had initially sought an amicable exit from the 1st respondent through Alternative Dispute Resolution (ADR), but later imposed a caveat on the 1st respondent's NCBA bank account, thus disrupting the 1st respondent's operations and causing product losses.
 5. He asserted that in as much as the petitioner resides in the UK, she mismanaged company affairs, including overpaying USD 6,720.00 to an account in Iran. Mr. Gathimba stated that appointment and removal of Directors are internal company matters governed by the *Companies Act*, 2015, and urged this Court not to interfere with shareholders' rights to make such decisions. He contended that the petitioner has not demonstrated irreparable harm or a prima facie case to warrant being granted the orders being sought.
 6. In a rejoinder, the petitioner filed a further affidavit sworn on 10th May 2023 by Ms Jane Wamoro Mukirae, the petitioner herein. She stated that the respondents' actions are geared towards leaving her with the burden of settling the 1st respondent's creditor's debts. She averred that she has personally covered the 1st respondent's debts and employee salaries due to the 2nd respondent's mismanagement. She contended that as a minority shareholder, she faces irreparable harm in the event that the instant application is not allowed. She urged this Court to intervene so as to prevent further oppression and mismanagement of the 1st respondent by the 2nd respondent.
 7. The application herein was canvassed by way of written submissions. The petitioner's submissions were filed on 18th May 2023 by the law firm of John Mburu & Company Advocates, while the respondents' submissions were filed by the law firm of Mutanda Law Advocates on 31st May 2023.
 8. Ms Wanjiku, learned Counsel for the petitioner relied on the case of *Giella v Cassman Brown & Co. Ltd* [1973] EA 358, and submitted that the petitioner has made out a case for being granted the orders sought herein. She cited the provisions of Sections 780(1) & 782 of the *Companies Act*, 2015 and submitted that as a minority shareholder, the petitioner was unfairly and oppressively removed as a Director of the 1st respondent. She submitted that the 2nd respondent failed to follow the proper legal procedure under Sections 139 and 141 of the *Companies Act*, 2015, for removing a Director. She asserted that the *Companies Act* requires a Special Notice to be issued and a Director to be granted 21-days to respond to the same, which was not done in this case.



9. She referred to the Court of Appeal case of *Mrao Ltd v First American Bank of Kenya Ltd* [2003] eKLR, and submitted that due to the fact that the 2nd respondent has mismanaged the 1st respondent company to her detriment, it demonstrates that the petitioner has a prima facie case with a high probability of success. In submitting that the petitioner will suffer irreparable harm that cannot be adequately compensated by an award of damages as her wrongful removal from directorship affects her rights and interests in the 1st respondent company. Ms Wanjiku relied on the case of *Angwenyi v Nairobi Cosmopolitan Conference Limited & 3 others* (Miscellaneous Application E095 of 2021) [2021] KEHC 115 (KLR), and stated that the balance of convenience tilts in favour of the petitioner.
10. Mr. Mutanda, learned Counsel for the respondents relied on the case of *Giella v Cassman Brown & Co. Ltd (supra)* and submitted that the petitioner has not satisfied the conditions necessary for being granted an order of interlocutory injunction. He argued that the petitioner's claims should be pursued through debt recovery proceedings rather than the current petition, as the company is a separate legal entity from its owners. He further submitted that since the petitioner has expressed willingness to exit the company, she cannot claim irreparable harm from her removal. He stated that any compensation for her shares can be determined through a valuation of the 1st respondent. Mr. Mutanda asserted that the 1st respondent is the legitimate owner of the funds in the bank account in question, hence it stands to suffer greater prejudice if it is unable to access the said funds.

Analysis and Determination.

11. I have considered the instant application, the grounds on the face of it, and the affidavits filed in support thereof. I have also considered the replying affidavit by the respondents and the written submissions by Counsel for the parties. The issue that arises for determination is whether the instant application is merited.
12. Order 40 Rule 1 of the *Civil Procedure, Rules*, 2010 provides for interlocutory injunctions. It states that -
 - 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
 - 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 orders.
13. An injunction is a discretionary remedy which is granted on the basis of sound evidence and the applicable legal principles. The principles to be considered by the Court when dealing with an interlocutory injunction application were laid down by the Court in the case of *Giella v Cassman Brown & Co. Ltd (supra)* as follows -

The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. 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.

14. The Court of Appeal in the case of *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* (*supra*), discussed what constitutes a *prima facie* case as hereunder –

So, what is a prima facie case I would say that in civil cases 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 as to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the Applicant's case upon trial. That is clearly a standard, which is higher than an arguable case.

15. The petitioner herein challenges the process of her removal as a Director of the 1st respondent company and as a signatory of the 1st respondent's NCBA bank account number [particulars withheld]. This Court notes that pursuant to the provisions of Section 139 of the *Companies Act*, a company has the right to remove Directors from office by ordinary resolution at a meeting. Section 141 of the *Companies Act* however provides for the rights of Directors to protest against such removal. Section 141 of the *Companies Act* provides that–

1. On receipt of notice of a motion for a resolution to remove a director under section 139, the company shall send a copy of the notice to the director concerned.
2. The director, whether or not a member of the company may be heard on the discussion of the motion at the meeting.
3. Subsection (4) applies when notice is given of a proposed resolution to remove a director under section 139.
4. Within twenty-one days after the notice is given, the director may make, with respect to the motion representations in writing to the company and request that the members of the company be notified of the director's representations.

16. It is not in contest that the 1st respondent company had only two directors and Shareholders before removal of the petitioner. She was the minority shareholder and the 2nd respondent was the majority shareholder. From the pleadings herein, it is evident that there has been a dispute between the parties herein on the day to day running and management of the 1st respondent and at some point, it was proposed in negotiations that the petitioner amicably leaves the 1st respondent, but the said negotiations never bore fruit.

17. Consequently, on 4th January 2023 the 1st respondent issued the petitioner with a Notice of a Special General Meeting of the 1st respondent's Directors, to be held on 10th February 2023 to pass a special resolution. On perusal of the annexures attached to the respondents' replying affidavit, I note that the petitioner responded on the same day stating that she was unavailable and had no proxy. She requested for the meeting to be rescheduled. On 10th February 2023, the 2nd respondent asked the petitioner to provide a suitable date and time when she would be available, but he later urged her to appoint a proxy to enable them continue with business as they sorted out their issues.

18. From the petitioner's response after receipt of the Notice of a Special General Meeting of the 1st respondent's Directors, I note that the petitioner was not agreeable to her being removed from office as



a Director of the 1st respondent company and/or as a signatory of its bank accounts. The respondents were as such under a duty to comply with the provisions of Section 141 of the Companies Act reproduced at paragraph 15 of this ruling.

19. The Notice of a Special General Meeting of the 1st respondent's Directors was sent to the petitioner on 4th February 2023. Despite the petitioner indicating her unavailability to attend the meeting, and her inability to send a proxy to represent her in the meeting, the respondents proceeded with the meeting and passed a resolution to remove her as a Director of the 1st respondent company and as a signatory of its bank accounts without giving her an opportunity to protest her removal. In the premise, I am persuaded that the petitioner has established a prima facie case with a probability of success on that ground.
20. The above finding notwithstanding, I note that the order being sought by the petitioner is a temporary injunction to restrain the respondents from registering or enforcing the special resolution that removed her as a Director of the 1st respondent. It is however worthy of note that annexed to the respondents' replying affidavit are copies of receipts for payment of an application for change of company officials dated 1st March 2023, which means that the action that the petitioner seeks to stop has already been done and even if I was to restrain the respondents from registering or enforcing the special resolution in question, the order would have no effect as it would have already been overtaken by events. It must be remembered that Court orders are not issued in vain.
21. On the issue of whether the 2nd respondent should be restrained from accessing, dealing with, or tampering with NCBA bank account number [particulars withheld] pending the hearing and determination of the petition, the petitioner asserted that the 2nd respondent unlawfully accessed and misappropriated funds from the 1st respondent's NCBA bank account. Other than make the said allegation, no evidence has been adduced to support the said assertion. The petitioner has not produced a copy of the 1st respondent's NCBA bank account statement evidencing the withdrawal of funds by the 2nd respondent. She has also not demonstrated how the said funds were misappropriated, utilized by third parties and/or used by the 2nd respondent for his personal gain.
22. I note that other than the NCBA bank account number [particulars withheld], none of the parties herein has claimed or even demonstrated whether the 1st respondent has any other bank account. I agree with the Counsel for the respondents that since the 1st respondent is the legitimate owner of the funds in the NCBA bank account, it stands to suffer greater prejudice if it is unable to access the said funds. In my considered view, an order restricting the 2nd respondent from accessing the said account would be detrimental to the daily running and management of the 1st respondent. On this issue, I am not satisfied that the petitioner has demonstrated existence of a prima facie case with a probability of success to warrant being granted the order sought.
23. As to whether the petitioner stands to suffer irreparable injury and damage in the event that the injunctive reliefs sought herein are not granted, I am not persuaded that this is the case. This is because the value of the petitioner's shareholding in the 1st respondent can always be determined by way of valuation during the pendency of this suit, upon application by any of the parties herein. Further, any misappropriated funds can be established from the 1st respondent's bank account statement. In the circumstances, it is my finding that any damage that the petitioner may suffer or may have suffered as a result of the application herein being disallowed can always be compensated by an award of damages in the event that her suit is successful.



24. The term “balance of convenience” was defined by the Court in the case of *Bryan Chebii Kipkoeb v Barnabas Tuitoek Bargarua & another* [2019] KEELC 3435 (KLR) as follows -

The meaning of balance of convenience in favor of the plaintiff is that if an injunction is not granted and the suit is ultimately decided in favor of the plaintiffs, the inconvenience caused to the plaintiff would be greater than that which would be caused to the defendants if an injunction is granted but the suit is ultimately dismissed.

25. From the analysis that I have made, it is my finding that the balance of convenience tilts in favour of the respondents.
26. In the result, the petitioner’s application dated 28th February 2023 is not merited. It is hereby dismissed with costs to the respondents.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 14TH DAY OF MARCH 2025.
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

NJOKI MWANGI

JUDGE

In the presence of:

Ms Wambui for the petitioner/applicant

Mr. Mutanda for the respondents

Ms B. Wokabi – Court Assistant.

