



REPUBLIC OF KENYA



**Muthoga & another v Kaiganane (Commercial Case
E001 of 2025) [2025] KEHC 4335 (KLR) (3 April 2025) (Ruling)**

Neutral citation: [2025] KEHC 4335 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
COMMERCIAL CASE E001 OF 2025
EM MURIITHI, J
APRIL 3, 2025**

BETWEEN

ANTHONY MUHORO MUTHOGA 1ST PLAINTIFF

MARURA POWERPOLES PLANT LIMITED 2ND PLAINTIFF

AND

JOHN GACHANGA KAIGANANE DEFENDANT

RULING

1. The application before the Court the Amended Chamber Summons dated 17/3/2025 (amended on 25/3/2025) seeking specific reliefs as follows:
 - a. That pending inter-partes hearing of this application, an interim measure of protection in the nature of an injunction does issue restraining the Defendant/Respondent herein, whether by himself, his agents, servants, employees or any other person acting under his instructions from interfering with the operations of the Marura Powerpoles Plant Limited (the “Company”) 2nd Plaintiff, locking the premises, interfering with customers, interfering with entry or exit from the premises of any authorized person into the company premises.
 - b. That the OCS Lukanga police station be ordered to maintain law and order.
 - c. That pending hearing and determination of the intended arbitration, an interim measure of protection in the nature of an injunction does issue restraining the Defendant/Respondent herein, whether by himself, his agents, servants, employees or any other person acting under his instructions from interfering with the operations of the Marura Powerpoles Plant Limited (the “Company”) 2nd Plaintiff, locking the premises, interfering with customers, interfering with entry or exit from the premises of any authorized person into the company premises.
 - d. That cost of the Application be in the cause.”



2. It was based on supporting Affidavit and further affidavit sworn by the 1st Plaintiff and founded on the grounds set out in the application as follows:
 - a. That the 1st Plaintiff/Applicant avers that together with the Defendant, they are directors and shareholders of Marura Powerpoles Plant Limited (the “Company”) the 2nd Plaintiff each holding 500 shares (with each holding 150 in trust for a third-party purchaser).
 - b. That the company 2nd Plaintiff is in the business of treating transmission and wooden poles and for the said purpose, the company 2nd Plaintiff owns and operates a wooden pole treatment plant along Makutano-Sagana highway, within the jurisdiction of this honourable court.
 - c. That for the past 14 years, the Plant has largely been inactive.
 - d. That to secure the Plant, the 1st Plaintiff avers that he has been maintaining some minimal operation with some lean staff.
 - e. That in the month of March, 2025, the 1st Plaintiff avers that the company took in a large delivery of treated and untreated poles from a client, who sought temporary storage of the said goods within the company’s unutilized yards.
 - f. That on or about 12th March, 2025, the Plaintiffs aver that the Defendant invaded the company’s premises on purported intentions to take over the management of the company.
 - g. That the Defendant, on the basis of the stored poles, claimed that the company has been running profitably and that he now wished to also run the company for a similar period.
 - h. That in the process, the Defendant unmounted and carted away the machine’s control unit thereby rendering the machine inoperative.
 - i. That further, the Defendant restrained the said customer from removing the poles from the yard without justification and or colour of right.
 - j. That the actions of the Defendant constitute a dispute between a company and its members, which, by virtue of Section. (sic)
 - k. That on 17th March, 2025, the Plaintiffs declared a dispute pursuant to clause 31 of the Articles of Association.
 - l. That unless the application herein is heard urgently, the Company will continue to suffer losses from non-operation of its plant while the untreated poles risks decaying thus exposing the company to substantial losses.”
3. Upon certification of the application as urgent in view of the reliefs sought, the Court directed that the same be served upon the respondent for hearing inter partes on the question of the jurisdiction of the Court and the authority of the 1st Plaintiff to sue in the Company’s name.
4. By a notice of withdrawal of suit dated 25th day of March, 2025, the 2nd Plaintiff wholly withdraws the entire suit against the Defendant. Consequently, only the 1st Plaintiff’s suit against the Defendant survived.
5. The amendment resulted in the surviving Suit by the 1st Plaintiff (now only Plaintiff) and the striking out of the 2nd Plaintiff as a plaintiff.



6. The new Plaintiff's suit is, however, not supported by a suitably amended Plaintiff and new Supporting Affidavit save the ones filed for the joint plaintiffs before the withdrawal.

Jurisdiction of the Court

7. Jurisdiction of the Court to issue the injunctive relief sought by the Petitioner herein is conceded by the Respondents as section 10 (of the *Arbitration Act*) stipulation as follows:

“7. Interim measures by court

- (1) It is not incompatible with an arbitration agreement for a party to request from the High Court, before or during arbitral proceedings, an interim measure of protection and for the High Court to grant that measure.
- (2) Where a party applies to the High Court for an injunction or other interim order and the arbitral tribunal has already ruled on any matter relevant to the application, the High Court shall treat the ruling or any finding of fact made in the course of the ruling as conclusive for the purposes of the application.”

8. The applicant amended the Petition to remove the Company as the second petitioner so as to avoid having to demonstrate authority of the Board of Directors to commence suit in the company's name. The issue of jurisdiction of the Court on the facts of the case remained.
9. Counsel made oral submissions on the amended application, the Supporting Affidavit of the 1st Plaintiff, the Replying Affidavit of the Defendant, the further Affidavit of the 1st Plaintiff, together with case law authorities relying on *Ogwedhi Properties Limited & another v Ollera Investments Limited & 3 others* [2024] KECA 124 (KLR) citing *Safaricom Limited vs. Ocean View Beach Hotel Limited & 2 Others* Civil Application No. 327 of 2009; and *Simon Mwangi v Chief Officer Finance Enoch K. Nguthu & 2 others* [2018] KEHC 4873 (KLR).

Question of Authority to sue in the Company's name

10. The Respondent submitted that the application by the Petitioner is still in essence a suit for the Company and the Plaintiff director must show authority to sue.
11. The applicant's Counsel answer to the opposition by the Respondent is that the question whether the applicant has authority of the Company to file suit is a merit issue for determination by the Arbitrator, just as the plea of preliminary objection based on the plea of *res judicata*, as held by the *Ogwedhi* court.

Cause of action

12. The 1st Plaintiff who is the remaining plaintiff following the withdrawal of the 2nd Plaintiff Company did not file an amended Plaintiff. The cause of action as set out in the Plaintiff dated 17/3/2025 is a complaint by the Company against a member of the Company as clearly shown in paragraphs 7-11 thereof as follows:

“7. On 14th March, 2025, the Plaintiffs aver that the Defendant with the assistance of armed goons, without any notice or colour of right, invaded the company premises, removed and took away the machine Control Unit which controls the operation of the Plant thereby grinding the plant to a halt.



8. The Plaintiffs further state that the 2nd attempted to chase away the employees of the 2nd Plaintiff.
 9. In addition, the Defendant restrained a customer who had deposited treated poles within the Plant for storage from removing the poles from the premises thereby exposing the said poles to loss.
 10. The Plaintiffs aver that the Defendant's intention is to frustrate the company's operations in an attempt to coerce the company to pay him non-existent dividends.
 11. The Plaintiffs avers that the Defendant's claim and actions constitute a dispute between members of the company and the company itself."
13. The decision of the Court in *Simon Mwangi v Chief Officer Finance Enoch K. Nguthu & 2 others* [2018] KEHC 4873 (KLR) (Odunga, J. as he then was) though a ruling in judicial review application is relevant to the question in this civil suit whether the 1st Plaintiff can sue for the Company and now without joining the Company in the suit:

" 33. In the pleadings filed in Court, the ex parte applicant herein presented himself as the aggrieved person. There was no averment at all that the Company could not act in its own name. The ex parte applicant for example stated that it was in fact him who applied for the licence and it was him who was issued with the licence. It is now clear that the licence holder was in fact the company. I therefore find that the ex parte applicant herein obtained leave by distorting the material facts which if disclosed this Court might have determined whether or not leave ought to have been granted."

14. The correct principle must be that matters relating to a company must be sued by and or in the name of the Company.
15. Recent developments in the law have softened the hard position on the issue of authority to sue in Company's name as held in *Bugerere Coffee Growers Ltd v Sebaduka & Anor*. (1970) 1 EA 147, but there is still requirement to show that the Director has been authorized by the Board. In the *Wanyiri Kihoro v Konahauthi Ltd* [2017] eKLR, the Court of Appeal noted these developments as follows:

"The second issue seems to have emanated from a decision of the Uganda High Court which has been followed and applied in this country for a long time; *Bugerere Coffee Growers Ltd v Sebaduka & Anor* (1970) 1 EA 147. The court in that case held:-

"When companies authorize the commencement of legal proceedings, a resolution or resolutions have to be passed either at a company or Board of Directors' meeting and recorded in the minutes, but no resolution had been passed authorizing the proceedings in this case. Where an advocate has brought legal proceedings without authority of the purported plaintiff the applicant becomes personally liable to the defendants for the costs of the action."

However, the principle enunciated in the *Bugerere* case has since been overruled by the Uganda Supreme court in the case of *Tatu Naiga & Emporium vs. Virjee Brothers Ltd* Civil Appeal No 8 of 2000 where the Court endorsed the decision of the Court of Appeal that the decision in the *Bugerere* case was no longer good law as it had been overturned in the



case of United Assurance Co. Ltd v Attorney General: SCCA NO.1 of 1998. The latter case restated the law as follows:-

“... it was now settled, as the law, that, it does not require a board of directors, or even the general meeting of members, to sit and resolve to instruct Counsel to file proceedings on behalf and in the names of the Company. Any director, who is authorized to act on behalf of the company, unless the contrary is shown, has the powers of the board to act on behalf of that Company.”

The decision has since been applied in Kenyan courts, for example, in Fubeco China Fushun v Naiposha Company Limited & 11 others [2014] eKLR.”

16. As the 2nd Plaintiff Company has withdrawn the suit against the defendant the issue of authority to sue in the Company’s name is at rest.
17. The question which remains is whether the dispute in this suit is for referral to arbitration, bearing in mind the cause of action in the Plaint herein, is a matter for the referral to an arbitrator. Both Counsel appeared to consider that to be so but a consideration of the suit reveals it to be otherwise.

No Arbitration Clause in this case

18. This Court respectfully agrees with the test for the grant of interim measures under section 7 of the Arbitration Act as observed by the Court of Appeal (citing Safaricom Limited, supra) in Ogwedhi Properties Limited & another v Ollerai Investments Limited & 3 others [2024] KECA 124 (KLR) as follows:

“28. Hence, when a court is confronted by an application for interim measures of protection pending an arbitration, its duty is only to perform a prima facie analysis to determine:

- i. If an arbitration agreement exists;
- ii. If the subject matter is under threat;
- iii. The appropriate measure of protection; and
- iv. The period for which the measure is to be given.

These factors are established in the leading authority namely the Safaricom Limited Case (supra).

29. In doing this analysis, the court is not permitted to delve into questions of whether the dispute as framed by the applicant is covered by the arbitration agreement since that is a matter reserved for the arbitrator in the first instance. This applies, too, to the jurisdictional question whether the dispute framed by the applicant is barred by a plea of res judicata owing to a previous decision related to the subject matter.
30. In view of this, we are, therefore, of the opinion, and we so hold that the learned Judge in this case erred by delving into the contested matters to determine if the plea of res judicata was applicable to the suit while that is a matter that should have been preserved for the arbitrator. The court was only obligated to determine, on the basis of the material placed before it and on a prima facie



basis, whether there was an arbitration agreement between the parties covering dispute as framed by the applicant.

31. Once a court concludes that there is in existence an arbitration agreement between the parties, then the only analysis the court does is whether the subject matter is under threat. If so, then appropriate measures of protection should be issued for a period deemed necessary by the court.”
19. The Check-list for grant of interim measures under section 7 of the *Arbitration Act* as observed by the Court of Appeal in *Ogwedhi* requires a determination as to the existence of an Arbitration Agreement at the outset. This Court has to determine under the first principle “If an arbitration agreement exists.” This determination clearly affects the jurisdiction of the Court to grant the interim relief and it is an antecedent to the arbitration and not a matter to be left to the arbitrator.
20. In this suit, it is not correct as pleaded at paragraph 12 of the Plaintiff that “12. Article 31 of the Company’s Article of Association provides that disputes between the company and members and between members should be resolved by way of arbitration.”
21. The text of Article 31 of the Articles of Association annexed to the Supporting Affidavit as “MM3” is as follows:
 - “ 31. Whenever any difference arises between the Company on the one hand and any of the members, their executors administrators, or assigns on the other hand, touching the true intent or construction, or the incidents, or consequences of these Articles, or the statutes, or touching anything then, or thereafter done, executed, omitted, or suffered in pursuance of these Articles, or of the statutes or touching any breach or to an alleged breach, of these Articles, or any claim n an account of any such breach, or to an statutes affecting the Company, or to any of the affairs of the Company, every such difference shall be referred to the decision of an arbitrator, to be appointed by the parties in difference, or if they cannot agree upon a single arbitrator to the decision of two arbitrators, of whom one shall be appointed by each of the parties in difference.”
22. There is no arbitration clause in the Article 31 in respect to dispute or differences between the members of the Company inter se. The provision for arbitration is only applicable to a difference between the Company on the one hand and the member(s), including their personal representatives and assigns, on the other. The first clause of the Article 31 that “Whenever any difference arises between the Company on the one hand and any of the members, their executors administrators, or assigns on the other hand” gives the Arbitration Clause; everything else in the Article is on the nature of the disputes that may be referred to the arbitration.
23. Once the 2nd Plaintiff Company is withdrawn from the suit by the withdrawal of the Company’s suit against the Defendant, there ceases to be any substratum under Article 31 of the Articles of Association for referral to arbitration of the dispute herein. Consequently, the provision of section 7 of the *Arbitration Act* for grant of interim measure of protection sought int the Amended Chamber Summons herein does not to apply. It is plain that there will never be any arbitration between the members of the Company under Article 31 of the Articles of Association.
24. There is no Arbitration Agreement on a dispute between the 1st Plaintiff and the Defendant. The consideration under section 7 of the *Arbitration Act* of any necessary measures does not arise.



25. The parties may benefit from mediation noting that their shareholding in the subject Company is equal, as indicated in Supporting Affidavit of the 1st Plaintiff that the two “are the shareholders and directors of the 2nd Plaintiff herein, each holding 500 shares (with each of us holding 150 shares in trust for a purchaser). A copy of the CR12 is produced hereto and marked AMM-1.”

It is unlikely that either party will secure the majority shareholding for purposes of authorizing the litigation in the name of the Company as presently constituted.

26. Consequently, the Parties to the dispute in this case may, if so advised by their legal advisors, seek the service of the Court Annexed mediation, and have an order of court fashioned and adopted from the mediation settlement thereafter.

Orders

27. Accordingly, for the reasons set out above, the Court finds that the Plaintiff’s amended application dated 17th day of March, 2025 and Amended on 25th March, 2025 is without merit and it is dismissed.

28. The Plaintiff will pay the Costs of this application to the Defendant.

Orders accordingly.

DATED AND DELIVERED THIS 3RD DAY OF APRIL 2025.

EDWARD M. MURIITHI

JUDGE

Appearances:

Mr. Mugo of M/S Gmr Advocates Llp. for the Applicant.

Mr. Gichigo of M/S Gichigo Kamangu & Associates LLP. for the Respondent.

