Khamis & 3 others v Muchura & 14 others (Civil Suit E034 of 2025) [2025] KEHC 10652 (KLR) (18 July 2025) (Ruling)

Neutral citation: [2025] KEHC 10652 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL SUIT E034 OF 2025

G MUTAI, J

JULY 18, 2025

BETWEEN

TAKDIR KHAMIS & 3 OTHERS & 3 OTHERS ..... PLAINTIFF

AND

TOM MUCHURA & 14 OTHERS & 14 OTHERS ..... RESPONDENT

RULING

1. Before this court is a Notice of Motion application dated 1st April 2025 through which the plaintiff/ applicant seeks the following orders:-

    a. Spent;

    b. Spent;

    c. Spent;

    d. That an injunction do hereby issue restraining the defendants, their servants and or agents from implementing all the resolutions of the Annual General Meeting held on 25th March 2025 pending the hearing and determination of this suit;

    e. That the costs of this application be provided for;

    f. Any other relief deemed just and fair to grant by the honourable court.

2. The application is premised on the grounds therein and the supporting affidavit of Mohamed Faki Khatib, an advocate of the High Court of Kenya and a member of the Mombasa Sports Club (hereinafter referred to as 'the Club'). Mr Khatib is also a Member of the Kenyan Senate representing Mombasa County. In the said affidavit, Mr Khatib deposed that in March 2023, his firm was instructed by some members of the club who were aggrieved by the trustees' decision to appoint a caretaker committee to run the affairs of the Club upon the expiry of the elected committee's term.

3. Further, in February 2025, his firm was again instructed by some Muslim members of the club who objected to the notice of a special general meeting dated 26th February 2025 through which it was sought to change the status of the club from a society to a company limited by guarantee. The said members objected to the notice on the grounds that Muslims were observing the holy month of Ramadan and would be breaking their fast at 7 pm, after which they would proceed for night prayers.

4. He stated that the 2nd, 3rd, and 4th plaintiffs/applicants proceeded to file a suit and obtained temporary injunction orders to stop the meeting scheduled for 11th March 2025. Before that, 10th March 2025, the honorary secretary of the club issued a notice of the Annual General Meeting (hereafter "the AGM"), which included as an agenda item a proposal to change the status of the club and to expel three members, including himself, from the club. The said plaintiffs objected to the notice stating that the issue of change of status was before the court.

5. Mr Khatib stated that upon receiving the court order of 20th March 2025, the respondents issued a notice cancelling the AGM that was to be held on 25th March 2025. He deposed that on 25th March 2025, while on official duty in Arusha, he received a WhatsApp message stating that there would be an AGM on the same date at 8 pm with the same agenda.

6. Although it was proposed to expel him from the membership of the Club, Mr Khatib averred that he was not informed of the charges against him. As an advocate of the High Court of Kenya, he has the right to represent any client who desires his services. He lamented that he was not accorded a fair hearing before the decision to expel him was made, and therefore, the expulsion is null and void.

7. In response the 6th and 10th defendants/respondents filed grounds of opposition dated 7th April 2025, opposing the application on the following grounds; that the application is frivolous, scandalous and vexatious; that the application has no merit and is an abuse of the court process; that the application is incompetent and not founded in law; that the application is premised on the allegations that it is the management committee and the trustees that made the decision to expel the plaintiffs /applicants which is a total misapprehension of reality as expulsion was an act done of the highest decision making organ of the club, the annual general meeting, the congregation of all the members of the club that happens before the end month of March every year and which happened on 25th March 2025 for this year; that the management committee or even the trustees cannot be equated neither can they stand in place of an annual general meeting of members neither can the defendants alter or go against a decision of the membership made in an annual general meeting where the plaintiffs are a part of. It was further stated that once the order issued by the lower court(Mombasa CMCC No.E283 of 2025) was lifted by the High Court in Mombasa HCCA No.E088 of 2025, there was no reason not to hold the AGM as required by the Club constitution and by-laws; that there was concerted effort to notify all members of the changes by way of WhatsApp mobile phone application, email, text messages and the notice board. It was stated that there was a huge turnout of members surpassing the constitutionally set threshold. The AGM proceeded smoothly, and all agenda items were fully covered, with resolutions made. The said respondents contended that the applicants were engaged in a cherry-picking exercise, picking the issues that they wanted reversed, leaving a whole spectrum of issues that were also passed in the same meeting, like the election of officials and the refund of the swimming pool money project, showing a lack of good faith and ulterior motives in the application. It was averred that the 'Muslim Members of the Mombasa Sports Club' is an entity unknown to the Mombasa Sports Club and is not one of the categories of membership. The 6th and 10th defendants/respondents contended that, as per its statute, the club was a non-religious and non-political members' club. They stated that since expulsion letters had already been issued and the plaintiffs/applicants had confirmed receipt of these letters, the resolution to expel them had been implemented. As such, there was nothing left to stay. Having been expelled, they are now former members of the Club.

8. The other defendants/respondents opposed the application through a replying affidavit sworn on their behalf on 7th April 2025 by Bij Vijay. He reiterated the position of the 6th and 10th defendants. He stated that the allegations that the management committee and/or the trustees decided to expel the plaintiffs/applicants are a total misapprehension of reality, as the expulsion was made by the highest decision-making organ of the Club during the AGM, the congregation of all the club members. The management committee/trustees cannot be equated with the members, nor can the defendants/ respondents alter or override the decision made by the membership in the general meeting.

9. Further, once the order was lifted by the High Court in Mombasa HCCA No. E088 of 2025, there was no reason not to hold the AGM as per *the constitution* and by-laws of the club.

10. Mr Vijay deposed that the reasons for the plaintiffs/applicants' expulsion were given in the notice calling for the AGM, as frustrating the management committee and club operations in the past three years. The plaintiffs were given an opportunity to defend themselves, but that they were not there to do so, nor did they send any communication of their inability to attend the AGM. He averred that the allegations by the 4th plaintiff/applicant that he was in Arusha are not substantiated and that an overwhelming majority of the members voted to expel the plaintiffs /applicants from the club. He too said that there is nothing to stay, as the resolution to expel the plaintiffs had already been implemented by the issuance of expulsion letters.

11. He stated that the phrase "Muslim members of the Mombasa Sports Club" is an entity unknown to the club and that it is not one of the categories of membership. Mr Vijay deposed that the alleged existence of the said cadre of members brought friction in the Club, contrary to its constitution, which states that the Club is a non-religious and non-political private members' club.

12. The plaintiffs filed a supplementary affidavit sworn on 15th April 2025, sworn by Mr Mohamed Faki Khatib. He reiterated the position in his supporting affidavit. He stated that by the time the lower court's orders were issued, the secretary of the club had already cancelled the annual general meeting. Some members objected to the short notice for convening the annual general meeting, but their concerns were ignored.

13. Further, under the bylaws of the club, disciplinary action is supposed to take place within 90 days of the date of the infraction.

14. The application was canvassed by way of written submissions, which were highlighted in Court on 21st May 2025. I will provide a summary of the submissions from the parties below.

15. The plaintiffs/applicants, through their advocates, Gikandi & Company Advocates, filed their written submissions dated 30th April 2025. Counsel reiterated the plaintiffs' position and submitted that the meeting of 25th March 2025, and all resultant resolutions are fundamentally flawed, illegal and void ab initio. He submitted that there was procedural irregularity in respect to the issuance and cancellation of the notice convening the meeting, denial of natural justice by not giving the plaintiffs/applicants the opportunity to defend themselves as mandated by rule 47(b) of the Club by laws, ultra vires proceedings by passing resolutions that exceeded the proper scope of an AGM as per rule 47(a) of the said bylaws.

16. Counsel further submitted that the basic structure of the club is that the club is made up of members who do not own any property of the club that they are members of, but they have rights, subject to complying with the rules, to enjoy the services offered by the said club. Therefore, the intended change of the club from a society to a company constitutes a change in its fundamental structure. Mr Gikandi submitted that those who started the club and secured the property upon which the club operates

were very clear in their minds that the said club will operate as a society having members who shall not have any proprietary rights over any property of the club and therefore the intended change by the defendants/respondents is not legally tenable, even if it was passed in full compliance with the rules and bylaws of the Club.

17. Counsel submitted that if the implementation made in the impugned AGM proceeded, it would be impossible to continue with the case as the club would cease to exist. It is possible to vacate the implementation of the resolution to expel the plaintiffs/applicants, allowing for the determination of the suit. Counsel urged the court to allow prayers 4 and 5.

18. The defendants, through their advocates Munyao, Muthama & Kashindi Advocates, filed written submissions dated 9th May 2025. Counsel submitted on two issues; whether the court has jurisdiction to hear and determine the plaintiffs/applicants suit and application dated 1st April 2025 for being res subjudice to the application dated filed by the same plaintiffs/applicants in Mombasa CMCC E283 of 2025 and whether the arbitration clause under rule 40 of the club by-laws had not been complied with. They also impugned the application as being frivolous, scandalous, vexatious, and raising no reasonable cause of action against the defendants/respondents. They contended that the plaintiffs/applicants were not entitled to the orders sought in their application.

19. On the issue of jurisdiction counsel submitted that the main issue in this matter is the club annual general meeting held on 25th March 2025 which was substantially in contention in Mombasa CMCC No.E283 of 2025 filed by the plaintiffs against the defendants seeking injunctive reliefs aimed at barring the convening of the special general meeting (SGM) and by extension the AGM. At the time of filing this matter, the lower court matter was still pending in court. The plaintiffs had the opportunity to present all issues arising from the AGM within that forum, which they failed to do; instead, they chose to initiate a separate action raising the same or substantially similar issues, thereby violating the principle against multiplicity of suits.

20. Further filing of a new suit on the same issues, between the same parties, and with the same subject matter, amounts to an abuse of court process and also offends the doctrine of subjudice under Section 6 of the *Civil Procedure Act*. With an appeal emanating from the interlocutory orders issued in the lower court matter pending before the court, it reinforces the fact that the issues raised herein remain subjudice. Proceeding with this matter not only undermines the appellate process but also creates an imminent risk of conflicting decisions from the court.

21. On the obligation to refer disputes for resolution through arbitration, counsel submitted that the club is a private member's institution governed by its constitution, by-laws and regulations, which are voluntarily assented to by every member upon joining the club. Rule 56 of the rules and by-laws provides that all disputes shall be referred to the committee or the trustees for arbitration. The plaintiffs, being members of the club at the time in question, were fully aware of the requirement, yet they blatantly disregarded it. The club's dispute resolution framework is binding, and disregarding the same renders these proceedings premature and improper before the court.

22. Counsel submitted that this court lacks jurisdiction to hear and determine the plaintiff's suit and that the same should be struck out in its entirety for being premature, bad in law, and res subjudice to Mombasa CMCC No. E283 of 2025 and Mombasa HCCA No. E088 of 2025, and for being an abuse of the court process.

23. On the application not raising any reasonable cause of action against the defendants/applicants, counsel submitted that the decisions of the club are made collectively by all members of the club and not the trustees or the management committee and therefore the application is frivolous, scandalous

and vexatious and does not disclose a reasonable cause of action against the defendant/respondents and for that reasons the same ought to be struck out.

24. On whether the plaintiffs/applicants are entitled to the orders sought, counsel submitted that the plaintiffs/applicants have not met the threshold for the grant of orders of injunction. Counsel relied on Order 40, Rule 1 of the Civil Procedure Rules and submitted that the plaintiffs/applicants are not entitled to the orders of injunction. Counsel urged the court to dismiss the application with costs.

25. The 6th and 10th defendants/respondents through their advocates Jackson Muchiri& Co. Advocates filed their written submissions dated 7th May 2025. Counsel submitted that many private member clubs, which were under informal and rudimentary registrations, have converted their legal statuses to companies limited by guarantee. Among the advantages of the conversion is that any meritorious litigation will be in the name of the club, rather than in the personal names of committee members or trustees. Further attendance and voting in the general meeting would be possible, both virtually and electronically.

26. Counsel submitted that the plaintiffs boycotted membership stakeholder engagement held on 26th February 2025 which was several days before commencement of Ramadhan and therefore the reasons for boycotting club events could not be Ramadhan.

27. Further, the process of changing *the constitution* and inviting members to give comments started in November 2024. A majority of the membership adopted the current constitution, and the suit should be against the entire membership of the club, not against any individual members.

28. I have considered the application, the responses thereto, as well as the oral and written submissions of the parties. Has a case for the grant of the orders of the injunction been made? What orders should the court issue under the circumstances of this matter?

29. I must state at the outset that the defendants, except for the 6th and 10th defendants, introduced new matters in their submissions. It is settled law that parties are bound by their pleadings. It is also trite that submissions are not pleadings. I am guided by the case of Daniel Otieno Migore v South Nyanza Sugar Co. Ltd [2018] KEHC 5465 (KLR) where the court stated as follows:-

> "It is by now well settled by precedent that parties are bound by their pleadings and that evidence which tends to be at variance with the pleadings is for rejection. Pleadings are the bedrock upon which all the proceedings derive from. It hence follows that any evidence adduced in a matter must be in consonance with the pleadings. Any evidence, however strong, that tends to be at variance with the pleadings must be disregarded. That settled position was re-affirmed by the Court of Appeal in the case of Independent Electoral and Boundaries Commission & Ano. vs. Stephen Mutinda Mule & 3 others (2014) eKLR which cited with approval the decision of the Supreme Court of Nigeria in Adetoun Oladeji (NIG) vs. Nigeria Breweries PLC SC 91/2002 where Adereji, JSC expressed himself thus on the importance and place of pleadings: -
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> > "...it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.....
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> > ...In fact, the parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as

joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation."

30. Having said the foregoing, I note that the *Arbitration Act*, Cap 49 of the Laws of Kenya, does not prevent a party aggrieved by a breach by another party of a contractual obligation in an agreement with an arbitration clause from approaching the court for interim reliefs. For that reason, I am unable to find, at this point, that the instant suit is defective or that it was filed improperly before the exhaustion of the provisions of the arbitral clause in the Club bylaws.

31. The three principles for granting an injunction were established in the case of Giella v Cassman Brown & Co Ltd [1973] EA 358, where the Court of Appeal stated: -

> " 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."

32. What then is a prima facie case? In defining prima facie case, the court in the case of JM v SMK & 4 others [2022] KEHC 2265 (KLR) stated that:-

> " What then constitutes a prima facie case? In the case of Mrao Ltd vs. First American Bank of Kenya Ltd & 2 Others [2003] KLR 125, the Court of Appeal held as follows:
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> > "The principles which guide the Court in deciding whether or not to grant an interlocutory injunction are, first, an applicant must show 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...A mere scintilla of evidence can never be enough: nor can any amount of worthless discredited evidence. It is true that the Court is not required at that stage to decide finally whether the evidence is worthy of credit, or whether if believed it is weighty enough to prove the case conclusively: that final determination can only properly be made when the case for the defence has been heard. It may not be easy to define what is meant by "prima facie case", but at least it must mean one on which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence...The terms "prima facie" case, and "genuine and arguable" case do not necessarily mean the same thing, for in using another term, namely a sustainable cause of action, the words "prima facie" are frequently used to refer to a case which shifts the evidential burden of proof, rather than as giving rise to a legal burden of proof in the manner of considering, which was in relation to the pleadings that had been put forward in the case. It would be in the appellant's interest to adopt a genuine and arguable case standard rather than one of a prima facie case, the former being the lesser standard of the two...In civil cases a prima facie case 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. 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."

33. The matters in question in this matter are the expulsion of the plaintiffs/applicants from the club and the change of the club's constitution. On one hand, the plaintiffs/applicants have questioned the procedure followed in convening the annual general meeting, which resulted in their expulsion and the change of the club from a society to a company limited by guarantee. They have also argued that they were not afforded the right to be heard. The defendants/respondents, on the other hand, have argued that the proper procedure was followed and the plaintiffs were given an opportunity to defend themselves, which they did not take.

34. In my view, the issues being raised in this application are triable issues. Whether or not the proper procedure was followed in convening the meetings is germane. The question of whether the plaintiffs/applicants had an adequate opportunity to defend themselves against the serious charges made against them also requires merit-based consideration. These issues can properly be adjudicated after a hearing on the merits. They cannot be dealt with at the interlocutory stage. Therefore, it's my finding that the plaintiffs have established a prima facie case. I am guided by the case of Paul Gitonga Wanjau v Gathuthi Tea Factory Company Ltd & 2 others [2016] KEHC 7263 (KLR) where the court stated that:-

> "In my view, all these are triable issues which can only be determined after a full hearing, upon hearing both parties, their witnesses and after testing the said evidence by way of cross-examination to determine its veracity or otherwise. After considering the said issues, I am persuaded that the applicant has satisfied the first test, that is, he has established a prima facie case worth proceeding for trial and determination."

35. As regards the second condition, whether the applicant stands to suffer irreparable loss, the Court of Appeal in the case of Nguruman Limited v Jan Bonde Nielsen & 2 others [2014] KECA 606 (KLR) stated that:-

> "On the second factor, that the applicant must establish that he "might otherwise" suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate, prima face, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot "adequately" be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy."

36. The Plaintiffs/Applicants, more so, Mr Khatib, are prominent members of the society. Mr Khatib is a senator representing the County of Mombasa in the Senate of the Republic of Kenya. He is also a senior advocate. His expulsion will be especially damaging for him. The damage that he may suffer is unlikely to be compensated by an award of damages. Accordingly, it is my view that with the issues at hand, the plaintiffs/applicants will suffer irreparable loss if the orders sought are not granted, and therefore, I find that the plaintiffs/applicants have satisfied the second test.

37. On the issue of balance of convenience, the court in the case of Pius Kipchirchir Kogo v Frank Kimeli Tenai [2018] KEELC 2424 (KLR) held as follows: -

> " The meaning of balance of convenience in favour of the plaintiff is that if an injunction is not granted and the suit is ultimately decided in favour of the plaintiff, 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. Although it is called balance of convenience, it is really the balance of inconvenience, and it is for the plaintiffs to show that the inconvenience caused to them would be greater than that which may be caused to the defendants. Should the inconvenience be equal, it is the plaintiffs who suffer? In other words, the plaintiffs have to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than which is likely to arise from granting it."

38. The change of *the constitution* of the club will be difficult to undo. Similarly, the damage to the reputation of the plaintiffs/applicants may become permanent. It will be better for the weighty issues in this matter to be resolved on merit, rather than at the interlocutory stage. I am guided by the case of Paul Gitonga Wanjau v Gathuthi Tea Factory Company Ltd & 2 others (supra) where the court stated:-

> " Thus, the court makes a determination as to which party will suffer the greater harm with the outcome of the motion. If the applicant has a strong case on the merits or there is significant irreparable harm, it may influence the balance in favour of granting an injunction. The court will seek to maintain the status quo in determining where the balance on convenience lies.
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> An injunction is an equitable remedy, meaning the court hearing the application has discretion in making a decision on whether or not to grant the application. The court will consider if it is fair and equitable to grant the injunction, taking all the relevant facts into consideration."

39. From the foregoing, it is evident that the application dated 1st April 2025 has, in my view, merit. The same is hereby allowed. I order that the costs of the application shall abide the outcome of the main suit.

40. It is so ordered.

DATED AND SIGNED IN MOMBASA THIS 18TH DAY OF JULY 2025. DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS.

GREGORY MUTAI

JUDGE

In the presence of: -

Mr Amakobe, for the Appellant/Applicant;

Mr Gikandi, for the Respondent; and

Arthur - Court Assistant.