



Tonui v Anzeze & 6 others (Commercial Case 84 of 2016)
[2024] KEHC 1076 (KLR) (Commercial and Tax) (19 January 2024) (Ruling)

Neutral citation: [2024] KEHC 1076 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE 84 OF 2016
MN MWANGI, J
JANUARY 19, 2024

BETWEEN

DAVID KIBET TONU I PLAINTIFF

AND

EPAINITUS GALO ANZEZE 1ST DEFENDANT

ERIC NDUMBU MWANDIA 2ND DEFENDANT

GODWIN WANGONG’U 3RD DEFENDANT

KENYA AIRPORTS PARKING SERVICES LIMITED 4TH DEFENDANT

LAWRENCE MADIALO 5TH DEFENDANT

SAMUEL KAHIGA 6TH DEFENDANT

AZICON KENYA LIMITED 7TH DEFENDANT

RULING

1. For determination is the applicant’s Notice of Motion application dated 25th May, 2023 brought under the provisions of Sections 1A, 3A and 3B of the [Civil Procedure Act](#), and Sections 317 and 318 of the [Companies Act](#), 2015.
2. The applicant seeks the following orders:
 - i. Spent;
 - (ii) That this Honourable Court be pleased to issue an order of temporary injunction directed at the 7th defendant restraining its Officers from passing resolutions which touch on or in any other way relate to the instant proceedings;



- (iii) That this Honourable Court be pleased to issue an order barring the 3rd defendant from attending Board meetings, taking minutes of meetings and in any way taking part in the activities of the 7th defendant pending determination of this suit; and
- iv. Costs be in the cause.
3. The application is premised on the grounds set out on the body of it and the supporting affidavit sworn by the plaintiff. The grounds are that the plaintiff herein filed a derivative claim as a minority shareholder citing various instances of company members acting outside the best interest of the 7th defendant company (hereinafter the company). That the 3rd defendant is the Company Secretary of both the 4th and 7th defendants and a shareholder of the 4th defendant.
 4. The plaintiff contended that a conflict of interest existed on the part of the 3rd defendant as he attends Board meetings of both companies and is assigned to draft minutes of the said meetings and that the 3rd defendant has shown a positive bias towards the other defendants in this suit.
 5. The plaintiff averred that he is apprehensive that if the 3rd defendant is to continue with regular secretarial tasks, the best interests of the 7th defendant may be compromised and that it is impossible for the 7th defendant to remove/suspend the 3rd defendant through a resolution given the nature of the instant proceedings which are not supported by his fellow directors.
 6. The defendants ardently opposed the instant application by filing replying affidavits.
 7. The 1st defendant's replying affidavit was sworn on 26/6/2023 by himself. He averred that he is the Chairman of the Board of directors of the 7th defendant and that the 3rd defendant has diligently discharged his duties as a Company Secretary to the 7th defendant but does not act as a Legal Advisor to the 7th defendant.
 8. Further, that the minutes of the Board meeting held on 30/8/2022 are a true reflection of what was discussed during the meeting. It was the 1st defendant's contention that the present application is not in the interest of the company, it is frivolous and ought to be dismissed.
 9. The 2nd defendant in his replying affidavit sworn on 23/6/2023 averred that during the Board of directors meeting of 30/8/2022, the Directors expressed their concern that the present suit was negatively affecting the company resulting in partial dormancy of the company which was not in its interest.
 10. The 3rd defendant in his replying affidavit sworn on 26/6/2023 stated that he is the Company Secretary of the 7th defendant and has at all times acted legally and in accordance with company secretarial standards while discharging his duties.
 11. The 3rd defendant denied being conflicted as the Company Secretary of the 7th defendant and asserted that the plaintiff has failed to demonstrate how his removal as the Company Secretary will promote the best interest of the company.
 12. The final replying affidavit was sworn by David Malombe, a Director of the company. His averments largely echoed those found in the aforementioned affidavits of the 1st, 2nd and 3rd defendants.
 13. In addition, he averred that the company is in a pathetic situation due to the present suit and that during a Board meeting, majority of the directors agreed that the prayers sought in this suit have been addressed and that the present suit ought to be withdrawn and that further issues ought to be resolved in a Board meeting. He pleaded that the suit ought to be dismissed with costs as it is not in the interest of justice.



14. The parties herein canvassed their respective positions through written submissions which the Court has carefully analyzed. The plaintiff's submissions are dated 17/8/2023, the 3rd defendant's submissions are dated 19/9/2023 while the 1st, 2nd, 5th and 6th defendants filed joint submissions dated 22/9/2023.

Analysis And Determination.

15. The first issue for determination is whether this Court should grant an order of temporary injunction directed at the 7th defendant restraining its Officers from passing resolutions which touch on or relate to the instant proceedings.
16. The plaintiff submitted that there is an ongoing derivative suit instituted by himself as a minority shareholder pertaining to various violations committed against the 7th defendant, including but not limited to fraud, improper use of the company name, breach of contract and conflict of interest. That the 1st, 2nd, 3rd, 5th and 6th defendants who possess a majority of the 7th defendant's shareholding have previously put forward Motions in the meeting of 8/2/2022 to withdraw both the 7th and 3rd defendants from the main suit.
17. The plaintiff is apprehensive that if such Motions are passed, it will result in the collapse of the case against the defendants herein as the involvement of the 7th defendant is pivotal to the derivative suit as the actions of the defendants directly caused harm to it.
18. It is the plaintiff's case that as a minority shareholder he is helpless in stopping such resolutions unless the Court intervenes and that a *prima facie* case exists against the Officers of the 7th defendant that warrants the granting of a temporary injunction barring its Officers from passing resolutions which relate in any way to the main proceedings.
19. On their part, the 1st, 2nd, 5th and 6th defendants submitted that the plaintiff has not produced evidence to demonstrate his allegations and to show which of his legal rights have been infringed upon.
20. Under Part XI of the [Companies Act](#), a derivative claim means proceedings by a member of a company in respect of a cause of action vested in the company and seeking relief on behalf of the company. It may be brought only in respect of a cause of action arising from an actual action or a proposed action involving negligence, default, breach of duty or breach of trust by a director. It may be brought against the director or another or both.
21. Thus a derivative claim is brought by a member of the company seeking relief and/or protection on behalf of the company. It is therefore a necessary party in a derivative claim. That being the case, the plaintiff's apprehension that the defendants as directors of the company may pass a resolution to withdraw the company and its Company Secretary from the derivative claim. holds no water. The plaintiff's apprehension is misconceived. It is not possible for such an action to be effected.
22. There is therefore no need to grant the plaintiff's prayer seeking an injunction to restrain the company's officers from passing resolutions which touch on or in any other way relate to the instant proceedings.
23. The second issue for determination is whether the Court should grant an order barring the 3rd defendant from attending Board meetings, taking minutes of meetings and in any way taking part in the activities of the 7th defendant pending the determination of this suit.
24. The prayer is seeking injunctive relief. In the oft cited case of *Giella v Cassman Brown* [1973] EA 358, the conditions to be considered before granting an interim injunction are:
- (i) the applicant must prove a *prima facie* case with a probability of success



- (ii) the applicant must illustrate that he will suffer irreparable loss and damage if an injunction is not granted
 - (iii) If the Court is in doubt, it will determine the matter on a balance of convenience.
25. On the first limb on whether the plaintiff has illustrated that it has a *prima facie* case with a probability of success, the plaintiff submitted that the 3rd defendant failed to record accurate minutes of the 7th defendant's Board meeting, despite being under a fiduciary duty of care to do so. That he is apprehensive that the 3rd defendant shall proceed to violate the fiduciary duty expected of him to advance his cause and that of the other defendants exposing the 7th defendant to mischief and prejudice. Further, that failure of the 3rd defendant to honour his duty to the 7th defendant is *prima facie* evidence of his unfitness to hold office with the 7th defendant.
26. Conversely, the 3rd defendant averred that any minutes that he recorded were subject to confirmation by the Board of directors and the Chairperson of the Board as the true record of the proceedings.
27. A *prima facie* case was addressed in the case of [*Mrao Ltd v First American Bank of Kenya Ltd & 2 others*](#) Civil Appeal No. 39 of 2002 as follows-
- “... 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 to call for an explanation or rebuttal from the latter.”
28. In order to establish a *prima facie* case, the Court should see on the face of it that the applicant has a right which has been threatened with violation.
29. In this case, the applicant submits that the 3rd defendant does not accurately record the minutes of the Board meetings of the directors and is conflicted due to the fact that he is also the Company Secretary of the 4th defendant company. He has however not provided an iota of evidence of such misconduct by the 3rd defendant.
30. On the contrary, it appears on the face of it that the 3rd defendant has the approval of majority of the company's Directors who have all, save for the plaintiff, ratified the minutes taken by the 3rd defendant from the meetings held by the Board of directors.
31. On the issue of conflict of interest, the plaintiff has also failed to show the Court at the *prima facie* stage how the 3rd defendant is conflicted due to the fact that he is the Company Secretary of both the company and the 4th defendant.
32. It is my finding that the plaintiff has failed to establish a *prima facie* case. As the first condition for the granting of an injunction has not been met, there is no need for this Court to consider the other conditions. This was so held in the case of [*Nguruman Limited v Jan Bonde Nielsen & 2 others*](#) [2014] eKLR, that:
- “If *prima facie* case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a *prima facie* case does not permit “leap-frogging” by the applicant to injunction directly without crossing the other hurdles in between.” (emphasis added).
33. The upshot is that the instant application lacks merit and is dismissed with costs being awarded to the defendants.

It is so ordered.



**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 19TH DAY OF JANUARY, 2024.
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

NJOKI MWANGI

JUDGE

In the presence of:

Mr. Ligami for the plaintiff/applicant

Mr. Ongengu for the 1st, 2nd, 5th and 6th defendants & h/b for Mr. Amuga for the 4th defendant

Mr. Kipkurui for the 3rd defendant

Ms B. Wokabi – Court Assistant.

