



REPUBLIC OF KENYA



**Awale & another (Affected Party) v Awale (Civil Case E090 of 2023)  
[2024] KEHC 1114 (KLR) (7 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1114 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL CASE E090 OF 2023  
DKN MAGARE, J  
FEBRUARY 7, 2024**

**BETWEEN**

**MOHAMMED JUMA AWALE ..... 1<sup>ST</sup> PLAINTIFF  
AWALE TRANSPORTERS ..... 2<sup>ND</sup> PLAINTIFF  
AFFECTED PARTY**

**AND**

**ABDIRAHMAN SALAD AWALE ..... DEFENDANT**

**RULING**

1. This is an application dated 27/11/2023 filed by the two applicants, seeking the following orders: -
  - a. Spent.
  - b. Pending and determination of the Application a temporary injunction prohibiting the Defendant from in any manner or otherwise dealing, with the management/staff, operations of the 2<sup>nd</sup> Plaintiff the 2<sup>nd</sup> Plaintiff's assets and Bank Accounts more specifically
    - i. Kenya shillings account No.xxxx at Stanbic Bank
    - ii. Us dollar account number No.xxxx at Stanbic Bank
    - iii. Kenya shillings account No account No.xxxx at Gulf Africa Bank
    - iv. Us dollar account number xxxx at Gulf African Bank
  - c. The applicant be granted leave to continue the derivative action seeking relief on behalf of Awale transporters limited in respect of acts and omissions by the defendant, involving fraud and breach of fiduciary duty and trust as a director of Awale Transporters ltd.



- d. Pending and determination of the suit a temporary injunction prohibiting the Defendant from in any manner or otherwise dealing, with the management/staff, operations of the 2<sup>nd</sup> Plaintiff the 2<sup>nd</sup> Plaintiff's assets and Bank Accounts more specifically
    - i. Kenya shillings account No.xxxx at Stanbic Bank
    - ii. Us dollar account number No.xxxx at Stanbic Bank
    - iii. Kenya shillings account No account No.xxxx at Gulf Africa Bank
    - iv. Us dollar account number xxxx at Gulf African Bank
  - e. Pending and determination of suit the defendant be compelled to produce all documents or records of the 2<sup>nd</sup> Plaintiff in his possession including cheques, deposit slips etc
  - f. An audit as to status of liabilities and assets of M/s Awale Transporters ltd be carried out by an independent auditor for the period of 20/4/22 to date.
2. The plaintiff is said to own 30% shareholding while the defendant owns 10% of the affected party. He stated that the majority shareholder is out of the country seeking medical attention. He stated that the Defendant single handedly took over the running of the company from 20/4/2023. The applicant states that the respondent is disposing assets being a wheeler loader, motor vehicle and other assets contrary to their trust duty.
  3. The Respondent has also withdrawn funds from the company accounts. He alleges fraud on part of the defendant. The amounts in each account are listed as having been withdrawn. It is the plaintiff's duty to have a derivative action be filed.
  4. Derivative action is filed where the company is unable to act through its directors. In the case of *Mohamedin Mohamed & another v Ibrahim Ismail Isaak & another* [2021] eKLR, justice A. Mabeya, FCI Arb, stated as doth:-

“

- “8. The Court has considered the deposition on record as well as the written submissions dated 1/02/2021. This is an application for permission to continue a derivative suit. In *Gbelani Metals Limited & 3 others v Elesh Gbelani Natwarlal & another* [2017] eKLR, the court explained: -

“Derivative actions are the pillars of corporate litigation. As I understand it, a derivative action is a mechanism which allows shareholder(s) to litigate on behalf of the corporation often against an insider (whether a director, majority shareholder or other officer) or a third party, whose action has allegedly injured the corporation. The action is designed as a tool of accountability to ensure redress is obtained against all wrongdoers, in the form of a representative suit filed by a shareholder on behalf of the corporation: see *Wallersteiner v Moir (No.2)* [1975] 1 All ER 849. 38.

Until 2015, in Kenya, the common law guided derivative actions in Kenya.

With the advent of the *Act*, the law fundamentally changed. The requirement to fall under the exceptions to the rule in *Foss v Harbottle* was replaced with judicial discretion to grant permission to continue a derivative action. Judicial approval of the action is what now



counts and such approval is based on broad judicial discretion and sound judgment without limit but with statutory guidance”.

5. Derivative claims now have their foundation in statute under sections 238-241 of the *Company's Act*. These provide as follows: -

- 1) In this Part, "derivative claim" means proceedings by a member of a company—
  - a. in respect of a cause of action vested in the company; and
  - b. seeking relief on behalf of the company.
- (2) A derivative claim may be brought only— under this Part; or  
in accordance with an order of the Court in proceedings for protection of members against unfair prejudice brought under this Act.
- (3) A derivative claim under this Part may be brought only in respect of a cause of action arising from an actual or proposed act or omission involving negligence, default, breach of duty or breach of trust by a director of the company.

6. The currently case is against a minority shareholder who is reportedly disposing assets in the background of the 90% majority who cannot for one reason or the other run the company. The defendant is a 10% shareholder while the 1<sup>st</sup> Plaintiff has 30%.

7. Given the facts set out, it is my finding that the issues raised amount to and can found on a *prima facie* basis breach of fiduciary duty. There are sufficient materials to found a derivative suit to proceed. In the circumstances, I grant leave as prayed to file this derivative action. The order shall be served within 14 days.

8. The Court no turns to the question whether, the plaintiff is entitled the other orders sought. The fist test is the issue of *prima facie* case. In *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* (2003) eKLR, the Court of Appeal stated:

“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.”

9. The principles guiding the grant of interlocutory injunction are now well settled. Those principles were set out in *East African Industries v Trufoods* [1972] EA 420 and *Giella v Cassman Brown & Co. Ltd* [1973] EA 358. In *Nguruman Limited v Jan Bonde Nielsen & 2 Others* [2014] eKLR the Court restated the law as follows:

“In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;

- (a) establish his case only at a *prima facie* level,
- (b) demonstrate irreparable injury if a temporary injunction is not granted, and
- (c) ally any doubts as to (b) by showing that the balance of convenience is in his favour.



These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See *Kenya Commercial Finance Co. Ltd V. Afraba Education Society* [2001] Vol. 1 EA 86. If the applicant establishes a *prima facie* case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. 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. It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or both that the question of balance of convenience would arise. The inconvenience to the applicant if interlocutory injunction is refused would be balanced and compared with that of the respondent, if it is granted."

10. The Court of Appeal in the case of *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] eKLR further opined that:

"...these are the three pillars on which rest the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially... if the applicant establishes a *prima facie* case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted will be irreparable. In other words, if damages recoverable in law are an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If *prima facie* case is not established, then irreparable injury and balance of convenience need no consideration.

11. In *Nguruman Limited v Jan Bonde Nielsen & 2 others (supra)*, the Court of Appeal agreed with the definition of a *prima facie* case in the Mrao case and stated:

"We adopt that definition save to add the following conditions by way of explaining it. The party on whom the burden of proving a *prima facie* case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. We reiterate that in considering whether or not a *prima facie* case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a *prima facie* case. The applicant need not establish title it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that *prima facie* case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the applicant's case is more likely than not to ultimately succeed.



12. The sale of assets and running of the company as a minority raise *prima facie* case. On irreparable loss, the court cannot wait for 10% shareholder to disappear with resources causing loss to the company and the majority 90% shareholders.

13. In *Halsbury's Laws of England, 3<sup>rd</sup> Edition volume 21, paragraph 739 page 352*, the learned author states as follows: -

“Injury which is substantial and could never be adequately remedied or atoned for by damages, not injury which cannot possibly be repaired and the fact that the plaintiff may have a right to recover damages is no objection to the exercise of the jurisdiction by grant of injunction, if his rights cannot be adequately protected or vindicated by damages. Even where the injury is capable of compensation in damages, an injunction may be granted, if the injury in respect of which relief is sought is likely to destroy the subjected matter in question.”

14. The law that governs Applications for injunction is premised under Order 40 Rule 1 of the [Civil Procedure Rules](#) 2010 which provides as follows:-

1. 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.

15. The balance of convenience til in granting some of the orders sought. In the case of [Bryan Chebii Kipkoech v Barnabas Tuitoek Bargarora & Another](#) [2019] eKLR, the court, Justice A. Ombwayo stated as follows: -

“The court should issue an injunction where the balance of convenience is in favor of the plaintiff and not where the balance is in favor of the opposite party. 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. 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.



In this case, the balance of convenience favors the grant of injunction as the plaintiff is in possession. He will be highly inconvenienced if injunction is not granted. On the other hand, the defendants have never utilized the lands for more than 12 years.”

16. I find that the facts, which are uncontroverted, point that the balance of convenience tilts in favour of the Plaintiff.

### **Determination**

17. In the end, I make the following orders: -
- a. The applicant be granted leave to continue the derivative action seeking relief on behalf of Awale transporters limited in respect of acts and omissions by the defendant, involving fraud and breach of fiduciary duty and trust as a director of Awale Transporters ltd.
  - b. Pending and determination of the suit a temporary injunction prohibiting the Defendant from in any manner or otherwise dealing, with the management/staff, operations of the 2<sup>nd</sup> Plaintiff the 2<sup>nd</sup> Plaintiff's assets and Bank Accounts more specifically
    - i. Kenya shillings account No.xxxx at Stanbic Bank
    - ii. Us dollar account number No.xxxx at Stanbic Bank
    - iii. Kenya shillings account No account No.xxxx at Gulf Africa Bank
    - iv. Us dollar account number xxxx at Gulf African Bank
  - c. An audit as to status of liabilities and assets of M/s Awale Transporters ltd be carried out by an independent auditor for the period of 20/4/22 to date. The parties to appoint an auditor within 30 days from the date of service hereof, failing which the Applicant to so appoint and the auditor be paid reasonable expenses out of the resource of the company.
  - d. Given that there was no opposition each party to bear its UBPARAe. Directions be given on 7/5/2024.

**DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 7<sup>TH</sup> DAY OF FEBRUARY, 2024.  
JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

**KIZITO MAGARE**

**JUDGE**

**In the presence of: -**

No appearance for Respondent

Ms. Monari for Applicant

Court Assistant - Brian

