



**Mwangi v Mwangi & 2 others (Commercial Suit E704 of 2021)  
[2024] KEHC 1555 (KLR) (Commercial and Tax) (16 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1555 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL SUIT E704 OF 2021  
FG MUGAMBI, J  
FEBRUARY 16, 2024**

**BETWEEN**

**GODFREY KIMANI MWANGI ..... PLAINTIFF**

**AND**

**ANDREW MACHARIA MWANGI ..... 1<sup>ST</sup> DEFENDANT**

**BENARD KAMAU NDIRANGU ..... 2<sup>ND</sup> DEFENDANT**

**MABRUUK ENTERPRISES LTD ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. Before the court is an application dated 30<sup>th</sup> November 2022 brought under Article 48 and Article 159 of the *Constitution* of Kenya 2010, sections IA, IB and 3A of the *Civil Procedure Act*, Order 51 of the *Civil Procedure Rules*, as well as sections 142, 143 and 239(1) of the *Companies Act* 2015.
2. The application seeks injunctive orders restraining the respondents from interfering or continuing with the construction on Plot 36/329/VII Eastleigh Section 7 along Timboroa Road (the suit property) or leasing the houses on the suit property. The application is premised on the grounds on the face of it as well as the affidavit sworn by Godfrey Kimani Mwangi 30<sup>th</sup> November 2022.
3. The applicant's case is that he is one of the majority shareholders in the company known as Kanorero Wendani Company Limited (the company), alongside the 1<sup>st</sup> and 2<sup>nd</sup> respondents who are minority shareholders in the Company. The applicant accuses the 1<sup>st</sup> and 2<sup>nd</sup> respondents of having entered into a joint venture with the 3<sup>rd</sup> respondent without consulting the majority shareholders and without a resolution of the Company, which is the proprietor of the suit property.



4. Pursuant to the said joint venture, the 3<sup>rd</sup> respondent started construction and leasing the houses to unsuspecting tenants thereby interfering with the interest of the Company on the suit property. It is the applicant's case that the said joint venture is illegal and cannot be relied on by the 3<sup>rd</sup> respondent.
5. The application is opposed by way of a Notice of Preliminary Objection dated 2<sup>nd</sup> February 2023 filed by the respondents. The respondents argue that this Court lacks jurisdiction to entertain any dispute pertaining to the use of suit property by virtue of the provisions of Article 162(2)(b) of the Constitution and section 13 of the Environment and Land Court Act No 19 of 2011.
6. Parties canvassed the application and preliminary objection by way of written submissions. The respondents written submissions to the preliminary objection are dated 14<sup>th</sup> February 2023. The applicants filed composite written submissions in respect of the preliminary objection and application, dated 6<sup>th</sup> July 2023.

Since the preliminary objection raises a jurisdictional question, it goes without saying that this issue ought to be determined a priori and in line with the decision in Owners of the Motor Vessel M.V Lillian S. v Caltex Oil (K) Limited [1989] KLR 1.

7. It is submitted by the respondents that the gist of the suit filed by the applicant is the boundary between plot number 495 and 496 situated in Industrial Area in Naivasha Town.
8. The applicant on the other hand insists that the suit before this court concerns the Company, that is Kanorero Wendani Company Limited and the illegal acts of the 1<sup>st</sup> and 2<sup>nd</sup> respondents. The applicant further acknowledges that the provisions are clear that jurisdiction in land-related matters belong to the ELC but submits that the provisions are less clear what "land-related" means. The applicant urges the Court to approach the question functionally as opposed to technically and to utilize the pre-dominant purpose test.
9. The applicant submits further that the dispute before the Court is not primarily about land since there is no dispute over the ownership of land. Rather, it is a dispute over the illegal joint venture entered into by the respondents. The right of the majority shareholders and the other members of the Company.

## Analysis

10. I have considered the pleadings, evidence, authorities and submissions filed by rival parties. I might say that the issue raised by the preliminary objection is the interesting legal question often referred to as "mixed grill" cases.
11. The parties have referred to a number of decisions including Peter Mutisya Musembi & another v National Bank of Kenya Limited, [2015] eKLR which referred to Dean Patty v Commonwealth Bank of Australia, [2000] FCA 1072. The common thread running through these decisions is the concurrence that with these cases, the Court that possesses the jurisdiction to determine the pre-dominant issue is the one with jurisdiction to determine the other matters of controversy in the course of their determination.
12. In Suzanne Achieng Butler & 4 others v Redhill Heights Investments Limited & another, [2016] eKLR, the Learned Judge (Ngugi, J as he then was), emphasized the need to balance between keeping to the constitutional imperatives on jurisdiction of courts and warned against invention or innovation to aggrandize its jurisdictional reach as this would amount to overreaching the mandate bequeathed by the people. Fortunately, it is now well settled that the test to use is the pre-dominant purpose test.
13. At the same time, the Learned Judge points out that: the correct approach to jurisdiction is one which treats the question functionally as opposed to technically; one that looks at the constitutional



- objectives in creating equal status Courts as opposed to engaging in an essentialist, taxonomical and categorical analysis.
14. A cursory look at the joint venture agreement entered into between the 3<sup>rd</sup> respondent and Kanorero Wendani Company Limited on 17<sup>th</sup> August 2020 confirms that the 3<sup>rd</sup> respondent is the joint venture entity Clause 3.1.3 clearly stipulates the objectives of the joint venture which are to acquire land, carry out the project and finally sell or lease the units. The agreement is executed by the 1<sup>st</sup> and 2<sup>nd</sup> respondents on behalf of the Company.
  15. I have also perused the plaint dated 23<sup>rd</sup> July 2021 and particularly the prayers sought therein, in a bid to determine the ultimate interest that the applicant seeks to pursue. Besides damages and costs, the applicant seeks the following prayers:
    - i. A declaration that any meeting that was held by the 1<sup>st</sup> and 2<sup>nd</sup> defendants for entering into a joint venture agreement with the 3<sup>rd</sup> defendant is null and void.
    - ii. A permanent injunction prohibiting the defendants either by themselves, their servants or in any other manner whatsoever from continuing with the ongoing construction in plot No 36/329/VII Eastleigh Section 7 along Timboroa Road.
    - iii. That the orders be enforced by the OCS Shauri Moyo police station or any nearest police officer.
  16. It is clear to me that the dominant element in this dispute is the joint venture agreement which takes the format of a commercial contract. At the heart of the dispute is the need to interrogate the viability and legality of the said venture agreement on which the activities that are being carried out are founded.
  17. Looking at the prayers that the applicant seeks, the Court will be called upon to determine the status and capacity of the legal entities to enter into the joint venture, whether the 1<sup>st</sup> and 2<sup>nd</sup> respondents had the authority to bind the Company, the status as well as rights and obligations of the resultant entity under the joint venture, the and subsequent remedy to the parties based on whether or not the joint venture is valid and enforceable. In my view, a determination of these questions will settle this dispute with finality.
  18. For the reasons that I have stated, it is clear that this Court is therefore clothed with the jurisdiction to hear the dispute. The preliminary objection is devoid of merit and the same is therefore dismissed. I will now move to the application dated 30<sup>th</sup> November 2022 for injunctive relief.
  19. The conditions for granting interlocutory injunctions are set out in Order 40 rule (1) (a) and (b) of the [Civil Procedure Rules 2010](#). These conditions have been interpreted and given effect through numerous judicial pronouncements. Amongst the most celebrated of these is the case of *Giella v Cassman Brown & Co. Ltd*, [1973] E.A 385. The Court at page 360 (Spry J) held that:

“The conditions for the grant of an interlocutory injunction are 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.” (emphasis mine)
  20. As already stated, the question as to whether the joint venture agreement is viable and the legality of the activities undertaken under the joint venture are issues that will have to be determined by the Court on merits. Taking a cue from the holding in [Mrao Ltd v First American Bank of Kenya Ltd &](#)



2 others, [2003] KLR 125 and based on the material presented before the Court, it is my finding that the applicant has established that he has a *prima facie* case that raises triable issues for rebuttal by the respondents.

21. As to whether the applicant is likely to suffer irreparable injury, which would not adequately be compensated by an award of damages, I find that the loss herein is quantifiable. The joint venture agreement contains details of the investment in a way that it is possible to compute the loss that will have been suffered by the applicant. This loss is perfectly capable of being compensated by way of damages.
22. Finally, as regards the balance of convenience, I note that the applicant acknowledges as paragraph 13 of his supporting affidavit that the respondents had already rented out the premises to tenants. The prayers for injunction are therefore overtaken by events at this time and it would be an exercise in futility to injunct that which has already happened. The balance of convenience therefore tilts in favor of not allowing the application for injunction.

#### **Determination**

23. The upshot of this is that the application dated 30<sup>th</sup> November 2022 is dismissed. The costs of this application shall await the outcome of the suit.

**DATED, SIGNED AND DELIVERED IN NAIROBI**

**THIS 16<sup>TH</sup> DAY OF FEBRUARY 2024.**

**F. MUGAMBI**

**JUDGE**

