



REPUBLIC OF KENYA



KENYA LAW

THE NATIONAL COUNCIL FOR LAW REPORTING

Where Legal Information is Public Knowledge

**Muthara v Mbogo & 19 others (Miscellaneous Civil Application E380 of 2023)
[2024] KEHC 3509 (KLR) (Commercial and Tax) (1 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 3509 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS CIVIL APPLICATION E380 OF 2023**

MN MWANGI, J

MARCH 1, 2024

BETWEEN

ROBERT NJOKA MUTHARA APPLICANT

AND

MARGARET RACHEL MBOGO 1ST RESPONDENT

ARTHUR MUNENE MBOGO 2ND RESPONDENT

ALVIN NDWIGA GATERIA 3RD RESPONDENT

ESTATE OF THE LATE KIMATA KARARI 4TH RESPONDENT

ESTATE OF THE LATE JOSEPH KARIUKI NYAMU 5TH RESPONDENT

ESTATE OF THE LATE MUTHONI MUCHIRI 6TH RESPONDENT

EBRAHIM NDIRITU MURIITHI 7TH RESPONDENT

JOSEPH NJAGI KAGAU 8TH RESPONDENT

NICASIO MURIITHI NJOKA 9TH RESPONDENT

BENJAMIN WANJOHI KARIMIRE 10TH RESPONDENT

GEORGE NDUIGA JOSEPH KARIUKI 11TH RESPONDENT

WALTER NYAMU KARIUKI 12TH RESPONDENT

ASNATH WANJIRA CHARLES KIMATA KARARI 13TH RESPONDENT

JOHN MURANGI MUCHIRI 14TH RESPONDENT

ESTATE OF THE LATE MURITHI WAGURA 15TH RESPONDENT

ESTATE OF THE LATE DAVID KARIMIRE MACHARIA ... 16TH RESPONDENT



ESTATE OF THE LATE EUSTACE KANGERWE KAGAU	17 TH RESPONDENT
NEW EMBU UHURU GARA	18 TH RESPONDENT
NATIONAL BANK OF KENYA	19 TH RESPONDENT
THE REGISTRAR OF COMPANIES	20 TH RESPONDENT

RULING

1. Before the Court is the applicant’s Notice of Motion dated 17th May, 2023, brought under Sections 1A, 1B and 3A of the *Civil Procedure Act*, Order 40 Rules 1 and 2, Order 51 Rule 1 of the *Civil Procedure Rules*, 2010 and all enabling provisions of the law. The applicant seeks the following orders-
 1. Spent;
 2. That a temporary injunction do issue restraining the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th, 10th, 11th, 12th 13th, 14th 15th, 16th, and 17th respondents from accessing and illegally dealing with the funds and assets belonging to the 18th respondent pending the hearing and determination of this application;
 3. That a temporary injunction do issue restraining the 1st, 2nd, 3rd, 4th, 5th 6th 7th 8th, 9th, 10th, 11th 12th, 13th, 14th, 15th, 16th, and 17th respondents from conducting any business as shareholders and/or directors of the 18th respondent pending the hearing and determination of this application;
 4. That a prohibition order do issue restraining the 19th respondent from disbursing any funds held by them in account Nos. 010200xxxxxxx, 010200xxxxxxx, 010202xxxxxxx,012460xxxxxxx and 013000xxxxxxx belonging to the 18th respondent to the 1st respondent and any other person or entity pending the hearing and determination of this application;
 5. That a temporary injunction do issue freezing any monies held by the 19th respondent in accounts Nos. 010200xxxxxxx, 010200xxxxxxx, 010202xxxxxxx, 012460xxxxxxxand 0130006xxxxxxx belonging to the 18th respondent pending the hearing and determination of this application;
 6. That an order do issue directing the 20th respondent to suspend all shareholding and structural changes of the 18th respondent initiated and effected after the orders issued by this Honourable Court on 23rd September, 2021 in HCCOMMMISC No. E820 of 2020 barring the same pending the hearing and determination of this application;
 7. That an order do issue directing the 20th respondent to suspend the CR-12 dated 11th May, 2023 and any other subsequent CR-12 pending the hearing and determination of this application;
 8. That the applicant be granted costs of this application; and
 9. That this Honourable Court do issue any such other and/or further orders as the justice of the case herein may demand.



2. The application is premised on the grounds set out on the face of it, the supporting and supplementary affidavits sworn by the applicant, Robert Njoka Muthara, on 17th May, 2023 and 22nd May, 2023, respectively. The averments in support of the application are that-
- a. The applicant is an heir and beneficiary of the estate of the late Josphat Njoka Mbiriai, who was one of the founding members and a shareholder of the 18th respondent, New Embu Uhuru Garage Limited (the company).
 - b. All the founding members and shareholders of the company are deceased and their respective estates are subject to succession proceedings.
 - c. Through the CR-12 dated 11th May, 2023, the 1st to 17th respondents caused a fraudulent and illegal altering of the shareholding structure of the company.
 - d. The Court vide orders issued on 23rd September, 2021 in HCCOMMMISC No. E820 of 2020 directed that parties must complete administration of the estates of the deceased shareholders in order to exercise the rights of shareholders.
 - e. The 20th respondent (the Registrar of Companies) by a letter dated 27th May, 2020 expunged from the Register changes made to the structure of the company and directed that no company meeting should be held before transmission of shares.
 - f. No transmission of shares has taken place as administration of the estates of deceased's shareholders is still ongoing.
 - g. No meeting of shareholders has ever been held and neither is there a company resolution sanctioning any structural changes of the company and any such meeting and/or resolution would be void ab initio.
 - h. The 1st to 17th respondents have no authority to transact on behalf of, conduct any business and/or deal with any assets belonging to the company.
 - i. The 1st respondent jointly with others after causing the fraudulent and illegal altering of the shareholding structure of the company funds withdrew company funds held in account Nos. 010200xxxxxxx, 010200xxxxxxx, 010202xxxxxxx, 01246xxxxxxx and 013000xxxxxxx belonging to the company and held by the 19th respondent (National Bank of Kenya, Embu Branch).
 - j. The affairs of the company are being conducted in a manner that is oppressive, illegal and prejudicial to the interests of its members including the applicant and the estate of the late Josphat Njoka Mbiriai.
 - k. The applicant is apprehensive that he and the estate of the late Josphat Njoka Mbiriai are bound to suffer irreparable loss and damage, if this Court does not issue the orders restraining the 1st to 17th respondents from accessing and illegally dealing with the funds and assets belonging to the company.
3. Through written submissions dated 27th June, 2023 and 26th July, 2023, the applicant contended that it had met the legal threshold for the grant of the orders sought.

Responses

4. The application is supported by the 12th and 20th respondents and opposed by the 1st to 11th and 13th to 19th respondents.



The 1st to 11th and 13th to 18th respondents' Response

5. The 1st to 11th and 13th to 18th respondents filed a replying affidavit sworn by the 1st respondent, Margaret Rachel Mbogo on 14th June, 2023 as well as written submissions dated 13th December, 2023. Their case is that the changes in the company's shareholding structure were made following the successful transmission of shares held by the estate of Gershon John Mbogo (deceased) to the 1st and 2nd respondents as the sole beneficiaries; that they undertook to complete the succession as directed by the Judge in HCCOMMISC No. E820 of 2020 and appointed new directors of the company to undertake the management and running of the affairs of the company in relation to the Articles of Association of the company and the *Companies Act*; that the applicant has failed to fault any document presented by the 1st and 2nd respondents as Administrators and the beneficiaries of the shares held in the company by the estate of Gershon John Mbogo (deceased); that the company's bank accounts do not belong to the estate of the late Josphat Njoka Mbiriani (deceased), the applicant's father. They stated that the applicant had failed to attach any document to prove to this Court that he has a prima facie case. They contended that the application is misconceived and prayed for its dismissal.

The 12th respondent's response

6. The 12th respondent, a beneficiary of the 5th respondent filed a replying affidavit sworn on 26th May, 2023 and written submissions dated 11th July, 2023. His position is that by filing the changes in the company's directorship and withdrawing money from its bank accounts, the 1st and 2nd respondents disobeyed Courts orders of 23rd September, 2021 in HCCOMM MISC E820 of 2020; that he did not sign the forms through which he was appointed a director and was not aware of the CR-12 that was expunged by the Registrar of Companies.
7. He also alleged that in this matter, Advocates have purported to act for him without instructions, and that the 1st respondent has not indicated whether she has authority to swear the replying affidavit on his behalf and on behalf of the 2nd to 11th and 13th to 18th respondents.
8. The 12th respondent further pointed out that the 19th respondent admitted that it received the letter dated 12th May, 2023 forwarding the Court order in HCCOMM MISC. NO. E820 of 2020 from the applicant's Advocates, Mugane & Co. Advocates; that in spite of this, the 19th respondent failed to verify the Court order and proceeded to effect the fraudulent transfer on 17th May, 2023, in breach of its duty to the 18th respondent to exercise due diligence; that the 20th respondent also perpetuated the fraud by the 1st and 2nd respondents through issuing the CR-12 dated 11th May, 2023 that was used to withdraw the funds, in spite of its earlier communication of 27th May, 2020 that there would be no changes in directorship effected until transmission of shares.
9. On the basis of the foregoing, the 12th respondent submitted that the applicant has met the threshold for the grant of the orders sought.

The 20th respondent's response

10. The 20th respondent filed a replying affidavit sworn on 24th July 2023, by Ann Kanake, an Assistant Registrar of Companies. In essence, the Registrar supported the application and undertook not to effect any changes in the company structure unless the applicants comply with the *Companies Act*, the law of succession and the Company's Articles of Association.
11. She deposed that since the incorporation of the company on 19th March, 1982, there were no changes in the initial shareholding and directorship from 1981 to 1990. That the annual returns for the



period 1991 to 2009 omitted the name of Mr. Peter Nyaga Muchungiri, as a director, but there were no supporting documents to support the change in the company structure; that in September 2010, Josphat Njoka, Kimata Karari, Josphat Kariuki Nyamu, Muthoni Muchiri and Murithi Wagura resigned as directors, whereas Asenath Wanjira, Grace Wangari Muriithi, Walter Nyamu Kariuki and James Gikandi Muchiri were appointed in their stead; that the resigning directors transferred their shares to the incoming directors; that following a complaint letter dated 30th October 2019 by the 1st respondent, the Registrar issued a letter dated 19th November, 2019 to the applicant and the other incoming directors requesting them to show cause why the changes should not be nullified and thereafter notified them that the entries had been cancelled through a letter dated 6th December, 2019.

12. The Registrar confirmed that she issued the letter dated 27th May, 2020 nullifying the changes in directorship effected as a result of the 1st respondent's notification of change of directorship on 16th December, 2019 and advised parties that before any change in directorship is effected, the Company needs to undertake transmission of shares from the estates of all the deceased's shareholders.

The 19th respondent's response

13. The 19th respondent filed a replying affidavit sworn by its Branch Manager, Robert W. Kariuki on 7th July, 2023 and written submissions dated 21st July, 2023. Its case is that it exercised due diligence when it released the money from the company's bank accounts held at its Embu Branch to the 1st and 2nd respondents based on the CR-12 dated 28th April, 2023, a grant issued on 12th July, 2001 and confirmation of grant dated 2nd December, 2022 in which the 2nd last entry provides for one (1) equal share held in the company to the 1st and 2nd respondents, and that it verified the authenticity of the said succession documents.
14. The 19th respondent confirmed that it was aware of, and does not dispute the Court's ruling of 23rd September, 2021 in which parties were ordered to complete administration of the estates of the deceased shareholders in order to exercise the rights of shareholders; that it received a letter from the applicant's Advocates, M/s Mugane & Co. Advocates dated 18th May, 2023 enclosing a letter from the Registrar of Companies dated 17th May, 2023 addressed to the 1st respondent, revoking the changes made to the directorship of the 18th respondent as reflected on the CR-12 of 28th April, 2023, initially served on it. That in good faith and with diligence, it exercised reasonable care and skill by promptly flagging the affected company's accounts to prevent any further unauthorized persons from accessing the accounts and to preserve the funds therein for the benefit of the company.
15. The 19th respondent asserted that its failure to freeze the company's accounts as requested by the applicant's Advocates was due to the fact that there was no Court Order to back the said request; that a company being a separate legal entity from its directors, it untenable in law for a bank to proceed and freeze a Company's accounts on mere instructions from an Advocate or individual in the absence of a Court Order or a resolution of a Company under seal; that a reversal order as sought would be an exercise in futility considering the time lapse after the time when the impugned transactions were effected on 17th May, 2023. It was stated that the applicant had not established any special circumstances to warrant grant of a freezing order.

Analysis And Determination.

16. I have considered the application alongside the supporting and supplementary affidavits. I have also considered the affidavits filed in response to the application, and the written submissions filed. The issue arising for determination is whether the applicant has made out a case for the issuance of a temporary injunction and a freezing order (mareva injunction).



17. The applicant seeks a freezing order against the 19th respondent, and claims to have met all the requisite conditions for grant of the orders. The applicant also seeks an order directing the 19th respondent to produce and file a statement of accounts in relation to the accounts for the company. He also seeks an order for the 1st respondent to return any funds that she jointly illegally withdrew with others, from the company's accounts. The 19th respondent on the other hand contended that the applicant has not met the legal threshold for being granted a freezing injunction.

18. The applicable provisions for temporary injunctions are Order 40 Rules 1 and 2 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.

2.

- (1) In any suit for restraining the defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not, the plaintiff may, at any time after the commencement of the suit, and either before or after judgment, apply to the court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained of, or any injury of a like kind arising out of the same contract or relating to the same property or right.
- (2) The court may by order grant such injunction on such terms as to an inquiry as to damages, the duration of the injunction, keeping an account, giving security or otherwise, as the court deems fit.”

19. From a close reading of the above provisions, a Court may only grant a temporary injunction where it is proved that the property in dispute in a suit is in danger of being wasted, damaged, sold, removed, or alienated by any party to the suit.

20. Additionally, the principles to be considered in an application for an injunction, were set out in the case of *Giella v Cassman Brown & Co Ltd* [1973] EA 358 as follows-

“(1) First the applicant must show a prima facie case with a probability of success.



- (2) Secondly an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable harm which would not be adequately compensated by an award of damages.
- (3) Thirdly, if the court is in doubt, it will decide an application on a balance of convenience.” (emphasis added).

21. In respect to the freezing order (mareva injunction) being sought so that none of the parties in this suit can withdraw cash in various bank accounts belonging to the company, the tests for consideration were laid out in *UBA Kenya Bank Limited v Sylvia Mututi Magosi* [2015] eKLR, as follows-

“However, a Mareva injunction is a freezing order and is an order in persona restraining or enjoining a person from dissipating an asset directly or indirectly, Goode on *Commercial Law* 4th Edition at page 1287 states thus;

- i. The grant of a freezing injunction is governed by principles quite distinct from those laid down for ordinary interim injunctions. Before granting a freezing injunction, the Court will usually require to be satisfied that; -
 - a. The Claimant has ‘a good arguable case’ based on a pre-existing cause of action.
 - b. The Claim is one over which the Court has jurisdiction.
 - c. The Defendant appears to have assets within the jurisdiction.
 - d. There is real risk that those assets will be removed from the jurisdiction or otherwise dissipated if the injunction is not granted.
 - e. The balance of convenience is in favor of granting the injunction.
 - f. The Court can also order disclosure of documents or the administration of requests for further information to assist the Claimant in ascertaining the location of the Defendant’s assets.” (emphasis added).

22. It is clear from the two authorities that I have referred to that although the principles for granting an interim injunction order and a mareva injunction differ, a common precondition is that there must be prima facie case or a good arguable case.

23. In this matter, the applicant’s claim is that through the CR-12 dated 11th May, 2023 the 1st to 17th respondents fraudulently and illegally caused the alteration of the shareholding structure of the company. The applicant also claims that the 19th respondent failed to exercise due diligence with respect to the company’s bank accounts. However, in the present application, there are no substantive prayers for a permanent injunction. To make matters worse, no substantive suit was filed by the applicant to form the bedrock from which the orders being sought could be grounded upon.



24. The position in law is that injunctive orders cannot be issued in a vacuum. An application for injunctive orders must be anchored on a substantive suit. In *Kihara v Barclays Bank Ltd* [2001] 2 EA 420, the Court stated as follows-

“Now reverting to the application before me, it is evident that although the same is expressed to be grounded under Order XXXIX, rules (1), (2) and (3) the same does not sound under rule 1(a) or (b) at all for the property subject matter of the injunction is neither mentioned in the suit as being in dispute nor is it in danger of alienation to defeat any decree. And rule (3) is merely procedural on the giving of notice of the application for injunction. The application thus falls squarely under rule 2. As indicated above, my reading of that rule is that the application must be made in a suit wherein the relief of a permanent injunction is sought. Such is not the case in the suit filed by the plaintiff. In those circumstances and seeing that the plaint has not been amended to incorporate such prayer and there is not even an offer of an undertaking to do so (the Plaintiff’s counsel merely observed that a plaint can be amended) I am constrained to agree with the submissions on behalf of the bank that the application is incompetent and ought to fail on this ground alone.” (emphasis added).

25. Similarly, in *Ngati & 4 others v Mutie & 7 others* (Environment and Land Case Civil Suit 63 of 2018) [2022] KEELC 13486 (KLR) (6 October 2022) (Ruling), the Court observed the following-

“57. Other than the foregoing decision, the necessity to seek for temporary injunction where there is No substantive prayer for permanent injunction, was addressed, considered and deliberated upon vide the case of *Kihara Versus Barclays Bank Ltd* [2001] 2 EA 420. See page 424, paragraph 9 thereof, where Justice Ringera underscored the necessity to have a substantive suit prior to and before seeking for temporary injunction.”

26. The applicant in prayers 2 to 7 of his application sought orders that were to last only until the hearing and determination of the application. As such, even if the applicant had filed a substantive suit, the Court could not have sought any other orders after the hearing and determination of the application. In the case of *Catherine Njeri Macharia v Macharia Kagiob & Another* [2013] eKLR, when the Court was faced with similar circumstances, it stated as follows -

“I accept and approve the holding by Hon. Justice Lesiit in HCCC No. 329 of 2003 *Ano Shariff Mohammed Vs. Abdulkadir Shariff Abdirahim* and Hon. Justice Fred Ochieng in HCCC No. 2047 of 2000 *Wilfred O. Musingo Vs. Habo Agencies Ltd* where my colleague judges were faced with applications seeking prayers similar in wording as in the instant application by the plaintiff. Justice Lesiit rendered herself as follows in the case referred to:

“The prayer seeks a stay of execution of decree pending the hearing and determination of this application. The issue is that once the application is heard and determined then what. I do not think the prayer is worded correctly as the stay of execution should be prayed pending something other than the application itself. Considering this prayer and the manner it is worded, it is my view that the entire application is spent and that there remains nothing for me to stay”.

For his part Hon. Justice Ochieng rendered himself thus: -

“Now I revert to the orders sought by the Defendant. First it seeks an order of stay of execution pending the hearing and determination of this application. In other words, the



very moment the court will have heard and determined the application dated 27th September, 2005 there would be no orders for stay of execution. Therefore, even if I were to grant prayer 2 as prayed, it would lapse as soon as I finish reading this ruling. As on 28th October, 2005, I had already given an order staying execution until today.

I hold that there is no need for the court to grant another order whose purport and effect would be the same as that which has already been given”.

27. Having fallen short of the legal requirements necessary in the filing of an application of this nature, the applicant’s Notice of Motion dated 17th May, 2023 is found to be devoid of merits. It is hereby struck out. Costs are awarded to the respondents.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 1ST DAY OF MARCH, 2024.
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

NJOKI MWANGI

JUDGE

In the presence of:

Mr. Gaitho for the applicant

Ms Aisha h/b for Mr. Chege for the 19th respondent

Ms Akoth h/b for Mr. Odhiambo for the 20th respondent

Ms B. Wokabi – Court Assistant.

