Kinuthia & another v Musingo & 2 others (Commercial Petition E001 of 2024) [2024] KEHC 5461 (KLR) (18 April 2024) (Ruling)

Neutral citation: [2024] KEHC 5461 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

COMMERCIAL PETITION E001 OF 2024

DKN MAGARE, J

APRIL 18, 2024

BETWEEN

JAMES JOHN KINUTHIA ..... 1ST APPLICANT

SERENITY INVESTMENTS LTD ..... 2ND APPLICANT

AND

ANDREW MUSINGO ..... 1ST RESPONDENT

PHILIP CAROLAN ..... 2ND RESPONDENT

ALLENA SWISS MANAGEMENT LIMITED ..... 3RD RESPONDENT

RULING

1. This is a rather controversial but friendly fire fight. It is a culmination of what looks like a night of long knives. The parties field matters against each other in Mombasa and Kwale.

2. Unfortunately for the parties, the level of cross referring and co-ordination as part of shared leadership is profound in the judiciary. In quite quick succession both matters fell into my hands. Parties had checkmated each other. As an ardent chess player, I found the best way to deal with the stalemate was to take away the board. I invited the parties to open court.

3. Parties agreed on the status obtaining before orders were issued. From thence, I crafted an order that maintained peace and tranquility as I pondered over the ruling. I deliver this ruling today hoping that what I seek as greed, subterfuge, misinformation and disinformation may cease.

4. The matter started with a petition seeking the following orders: -

    a. A declaration that the Respondents actions through the resolutions passed between the month of December 2023 and January 2024 are oppressive and or unfair and prejudicial to the interests of the Petitioners.

b. An order be and is hereby issued nullifying all and any resolutions passed between the month of December 2023 and January 2024 touching on the management affairs of the 3rd Respondent and impacting negatively on the operations of the 2nd Petitioner in the provision of property management and hospitality services on behalf of the 3rd Respondent as well as the investment in the rooftop restaurant, for being irregular, unfair and oppressive to the 1st and 2nd Petitioners.

c. An order restraining the Respondents whether by themselves, agents, servants or otherwise howsoever from taking any precipitate action including making decisions, giving instructions, writing and signing letters, notices, forms, deeds, minutes, resolutions, returns and any other documents in the name of and/or on behalf of the 3rd Respondent which may in any way impact negatively on or interfere with the 1st Petitioners investment in the rooftop restaurant as well as the day to day operations of the 2nd Petitioner as the property management and Hospitality provider of the 3rd Respondent.

d. An order for compensation and damages against the 1st and 2nd Respondents for losses incurred, lost business opportunity, including projected profits and future revenue streams as a result of the negative impact of the 1st and 2nd Respondents action on the operations of the 2nd Petitioner as the property management and hospitality service provider.

e. An order be and is hereby issued directing the members of the 3rd Respondent to settle all the historical expenses incurred by the Petitioners over and beyond what was collected in service charge and expended in the management and hospitality of the 3rd Respondent.

f. This court do issue such further orders and give such directions as it may deem fit to meet the ends of justice and the protection of the Petitioners' rights in the context of the declarations made.

g. That the costs of the suit be awarded to the Petitioner against the 1st and 2nd Respondents.

5. As usual in these kind of cases, the petition was accompanied by a notice of motion under certificate. The petitioner/Applicant sought the following orders in the said notice of motion: -

a. Spent

b. Pending the hearing and determination of the main suit, a temporary injunction be and is hereby issued staying the effect of all and any resolutions passed by the directors and or shareholders of the 3rd Respondent between the month of December 2023 and January 2024 interfering with the operations of the 2nd Applicant as the property management and hospitality service provider of the 3rd Respondent.

c. Pending the hearing and determination of the main suit, temporary injunction be issued restraining the Respondents whether by themselves, agents, servants or otherwise howsoever from taking any precipitate action including making decisions, giving instructions, writing and signing letters, notices, forms, deeds, minutes, resolutions, returns and any other documents in the name of and/or on behalf of the 3rd Defendant which may in any way impact negatively on or interfere with the 2nd Applicants operations as the property management and Hospitality provider of the 3rd Respondent.

d. Pending the hearing and determination of the main suit, an order be and is hereby issued compelling the directors and or shareholders of the 3rd Respondent to continue paying service

charge to the 2nd Applicant as has been the case, including the outstanding service charge for the month of December 2023 and January 2024.

e. The costs of this application and interest thereon be borne by the 1st and 2nd Respondents;

f. N/a

6. The said application was supported by an affidavit of James John Kinuthia. He filed a further affidavit dated 9/2/2024. This was to clarify two issues, that is opening an account and the number of shares in the 3rd Respondent.

7. The Respondents responded through an Affidavit sworn on 6th February 2024 Andrew Misingo Otieno, the first Respondent. He denied the claim and stated that the Applicant's suit is a duplicity of the Kwale HCCC No. 2 of 2024. They stated the case has no legs to stand on. As a corollary they pointed out that the Applicant stealthily changed the shareholding structure by increasing shares to 1600 instead of 1200.

Submissions

8. Parties filed submissions pursuant to directions I issued earlier. The Applicants filed submission dated 19th February, 2024. It was submitted that the Application was premised on Section 780 of the *Companies act* 2015 seeking the protection of members against oppressive and unfair practice. They relied on *Velani & 6 others v Naran & 2 others (Petition E002 of 2020*) [2021] KEHC 75 (KLR) (Commercial and Tax) (21 September 2021) (Judgment) as follows: -

> " The words "oppressive "or "unfairly "enables the court to consider wider equitable considerations and recognizes that the member have rights and expectations which are not necessarily included in the Articles of Association. For example, a member's interest may arise out of an agreement that some or all members should participate in the management of the Company. A member's interest is not. Therefore, limited to his strict legal rights, butt can extend to legitimate expectations arising from the nature of the Company and agreements and understandings between the parties.

9. They relied on Section 780 of the *Companies Act*, 2015, which provides as follows: -

> " Application to court by company member of order under Section 796(1) A member of a company may apply to the court by application for an order under section 782 on the ground – (a) that the company's affairs are being or have been conducted in a manner that is oppressive or is unfairly prejudicial to the interests of members generally or of some part of its members (including the applicant); or (b) that an actual or proposed act or omission of the company (including an act or omission on its behalf) is or would be oppressive or so prejudicial."

10. The Applicants submitted that the actions of the Respondents were oppressive an unfairly aimed at disrupting the management decision in the company.

11. On their part the respondents filed submission dated 28th February, 2024. It was submitted that for an injunction to issue, the conduct of the Applicant must meet the approval of the Court of equity as stated in Michael Gitere & Another v Kenya Commercial Bank Limited [2018] eKLR as follows: -

> " 45. It was therefore held by Ringera, J (as he then was) in Dr. Simon Waiharo Chege v Paramount Bank of Kenya Ltd. Nairobi (Milimani) HCCC No. 360 of 2001:
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> "The remedy of injunction is one of the greatest equitable relief. It will issue in appropriate cases to protect the legal and equitable rights of a party to litigation which have been, or are being or are likely to be violated by the adversary. To benefit from the remedy, at an interlocutory stage, the applicant must, in the first instance show he has a prima facie case with a probability of success at the trial. If the Court is in doubt as to the existence of such a case, it should decide the application on a balance of convenience. And because of its origin and foundation in the equity stream of the jurisdiction of the Courts of judicature, the applicant is normally required to show that damages would not be an adequate remedy for the injury suffered or likely to be suffered if he is to obtain an interlocutory injunction. As the relief is equitable in origin, it is discretionary in application and will not issue to a party whose conduct as appertains to the subject matter of the suit does not meet the approval of the eye of equity."

12. The respondent submitted that it is the Applicant who was engaged in insidious and selfish activities and so did not deserve the orders sought. They relied on Udali Group Limited v Umberto Rocardo Dellaavale & 3 Others [2018] Eklr

Analysis

13. The questions that lingers in my mind is whether a delegate can delegate. Not actually delegate but overtake the principal. The principle of delegatus non potest delegare comes in handy. Can a delegate further sub-delegate?

14. This matter is a manifestation of greed, hyperbole and surmises. Parties conjuring up a dispute while masking their true intentions. The claim in this case though camouflaged as a legal dispute, is a vicious fight between the visions of a developer and the new owners.

15. From the facts, the Applicant herein was the original owner of the land that comprises of the suit property. He created within it several units which he has sold to several members. The 1st Applicant appears to have had one last piece created in the most unlikely of places, the roof top.

16. From my reading of the law, I find nothing anomalous since the title to the condominium properties end up at the middle of the wall. Then it naturally follows that he retained the last possible space towards the heavens. I recall all maxim of cujus est column eius est usque ad coelom et enferos.

17. There appears to be a sense in which the original owner, the 1st Respondent retained the inferos (all the way to hell and coelom (all the way to heavens).

18. The rest of the people retained their units. The only other claim they have are commons areas. Am aware there is a dispute elsewhere whether the rooftop is a common area. I shall not venture into the

ownership of the land lest is digress contrary to Article 165(5) of *the Constitution*. For good measure the said Article provides as follows:-

> "(5) The High Court shall not have jurisdiction in respect of matters—
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> (a) reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or
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> (b) falling within the jurisdiction of the courts contemplated in Article 162 (2)."

19. For purposes of this application is the application for injunction by the Applicants. The 1st applicant and the comma which he is a director, have had an arrangement wherein they ran security of the Amani Luxury Apartments. The Applicants runs a roof top bar. The same appears to be lucrative. The 3rd defendant is the management company. The defendants state that it runs the reversionary interest on behalf of the twelve owners of the apartments. The owners of this 12 apartments, including the 2 applicants pay service charge which then runs security. The Applicants posit that they have been running security for over 10 years. The two applicants maintain that the rooftop consists of 4 shares.

20. There appears to be a meeting which was called during the Christmas holidays, held on 11/1/2024. They resolved to have a subcommittee, to which 1st and 2nd Respondents ended up being members. Things then spilled too quickly. They sat as a committee and agreed to have a new service provider. In that short period they already had a service provider and needed the Applicants out as security providers.

21. They also needed the applicant out of the roof top. The case on the roof top is elsewhere. It is stated that on 20/1/2024 an emergency meeting was made in respect service charge. They also diverted service charge to Ernest Njuguna. They took in another company Braxton Hospitality to replace the 2nd Petitioner.

22. The Applicant filed a further affidavit stating that the 3rd defendants share capital is 1600 not 1200. The applicants stated that they have gone ahead and forged his signature to open a bank account No. 903XXX12 at NCBA Bank.

23. The 1st Respondent filed a response on behalf of the company and himself. He stated that there is another issue, being Kwale HCC E002 of 2024 filed by the 3rd defendant against the petitioners herein. The suit was filed on 26/12/2024. They stated that this suit should be struck out in limine.

24. They also made a suggestion which I think is reasonable that this suit should be transferred to Kwale High Court. Farr history's record, through Kwale High Court exist, it is still a circuit court manned by Mombasa High Court Judges. The Respondents admitted that the 1st Applicant was the registered proprietor of Kwale/Diani /55/2517 and he put up two properties totaling to 6 two bedroom apartments each.

25. He stated that various parties have 100 shares in the 4th Respondent company of 100 each. With a share capital of 1,600. They enclosed a share certificate for one. They stated that the 2nd Applicant is not a purchaser of any apartment but is a shareholder. They state that such shareholding is illegal.

26. They stated that the increase of the share capital was illegal, irregular and un-procedural. They also stated that the Applicant stealthily registered a lease for the roof top apartments.

27. There is therefore a dispute on the role of the 1st Applicant. The parties appear to have been paying to the Applicant for services. I enquired and found that the security placed by the Applicant is in situ. It

has been for the longest time that can be imagined. While the parties were Highlighting, there appears to be a prima facie case in regard to the nature of the decisions.

28. There are employees who are working and are remunerated through service. Before a decision is made, there needs to be a specific board or annual general meeting decision, including their fate. For this court, the only question of interest is how the directors are treating each other. The question of the legality of shares is an arguable question.

29. However, as far as the court can note, there is a no search showing shares of 1200. The company has 1600 shares. Apartments the applicants have more than 500 shares in the company. They could even be less. Nevertheless the facts as laid out show a prima facie case. In the case of Mrao Ltd v First American Bank of Kenya Ltd& 2 others [2003] eKLR, the court of Appeal noted that: -

> " 4. A prima facie case in a civil application includes but is not confined to a "genuine and arguable case." It is a case 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."

30. Secondly, the court is bound to move sequentially in terms of the decision in 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."

31. The Applicants have a task to meet the requirements set out in The locus classic case of Giella v Cassman Brown & Co. Ltd [1973] EA, 358, 360, sets out principles for grant of injunction. The court, stated as follows, though the wisdom of Spry VP, as then he was, as follows: -

> " 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. The loss of jobs or employees and exclusion of aa substantial Section of the directors is real. The Respondent do not recognize the 2nd applicant. This means they did not bother informing then. I have seen the kind of notices uses. I am satisfied that questions of their property are real.

33. Is there a chance of irreparable loss. The loss that has been demonstrated by both parties is monumental. Such a loss both is the 3rd Respondent, Applicants and the employees, is catastrophic. There is apparent illegality demonstrated by patent breach of the basic right to be heard.

34. This is an old adage that delegate potestas non potest delegari. The 3rd Respondent is a management company to manage. It has powers to hire or engage service providers. This appears to be the case for the 2nd Respondent. However, it is doubtful, that the committee delegated to manage can further delegate.

35. It is thus important that the court looks at the decision of the committee where the 1st and 2nd defendant are members. I note that the 1st Respondent purports to answer questions on behalf of the 3rd respondent. In a dispute between the directors the 3rd respondent remains a nominal respondent. I shall consider responses by the 1st and 2nd respondent to relate to them. Given the patent illegality it is clear that a question of balance of convenience is in favour of maintaining a contract already in force. This will safeguard jobs and the status quo.

36. The risk is dire if the decisions turnout to be illegal and un-procedural. In Macfoy v United Africa Co. Ltd [1961] 3 All E.R. 1169, Lord Denning delivering the opinion of the Privy Council at page 1172 (1) said: -

> " If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."

37. In the case of Esso Kenya Limited. v Mark Makwata Okiya Civil Appeal No. 69 of 1991 by the Court of Appeal stated as follows:

> " The principles underlining the granting or refusal of injunction are well settled in several decisions of the court. Where an injunction is granted, it will preserve or maintain the status quo of the subject matter pending the determination of the main issue before the court. The merits or demerits of granting injunction orders deserve greater consideration. The court should avoid granting orders which have not been asked for in the application before it or determine issues in the suit before the actual hearing. In cases where an award of damages could be adequate compensation, an injunction should not be granted. On an application for an injunction in aid of a plaintiff's alleged right, the court will usually wish to consider whether the case is so clear and free from objection on equitable grounds that it ought to interfere to preserve property without waiting for the right to be finally established. This depends upon a variety of circumstances, and it is impossible to lay down any general rule on the subject by which the court ought in all cases to be regulated, but in no case will the court grant an interlocutory injunction as of course...The court ought to look at the allegations in the affidavits by the plaintiff and the defendant and weigh them whether there is a possibility of the plaintiff succeeding or whether there is a possibility of quantifying damages. Only in cases of doubt court will proceed on the basis of the balance of convenience while being aware that formal evidence will be adduced at the hearing...The principle underlying injunctions is that the status quo should be maintained so that if at the hearing the applicant obtains judgement in his favour the respondent will have been prevented in the meantime from dealing with the property in such a way as to make the judgement nugatory...As it is settled law that where the remedy sought can be compensated by an award of damages then the equitable relief of injunction is not available."

38. The application is thus merited. I allow the same. Each party shall bear their own costs.

39. It is remembered that the Defendant requested the court to transfer this suit to Kwale. This is a good request. The same is allowed. This file shall be consolidated with Kwale HCC No. 2 of 2024. This file shall be the lead file. I shall give a date for direction upon delivery of this Ruling. Costs shall be in the cause.

Determination

a. There is hereby issued an injunction against the Defendants, their agents or servants restraining them from interfering with the management and operations of the security investments Ltd as a service provider for property management and hospitality service to the 3rd Respondent pending hearing and determination of the suit.

b. An injunction is hereby issued restraining the defendants from charging the share structure or in any way, interfering with the 2nd Applicant as a service provider for the 3rd Respondent.

c. An order is hereby issued against the defendants to continue paying service charge including outstanding service charge and in no way to sabotage the provision of hospitality service by the 2nd Applicant.

d. The matter is transferred to Kwale for hearing and determination.

e. The same shall be consolidated with Kwale HCC 140 of 2024. This file shall be the lead file.

f. Costs in the cause.

DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 18TH DAY OF APRIL,2024.

Ruling delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

In the presence of:

Odete for the 1st and 2nd Applicant

Mr. Waziri Omollo for the Respondents

Court Assistant - Brian