



**Moore v Seton & another (Insolvency Cause E006 of 2023)
[2024] KEHC 5468 (KLR) (Commercial and Tax) (14 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 5468 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INSOLVENCY CAUSE E006 OF 2023**

FG MUGAMBI, J

MAY 14, 2024

BETWEEN

KATHERINE LINDA MOORE PETITIONER

AND

DAVID SETON 1ST RESPONDENT

PAKANAANI LE CHAT LIMITED 2ND RESPONDENT

RULING

Background

1. This ruling determines the application dated 1st November 2023, brought under section IA and IB, 3 & 3A of the *Civil Procedure Act*, section 3 of the *Prevention of Cruelty to Animals Act*, Order 40 rule 1 and 2, and Order 51 rule 1 of the *Civil Procedure Rules*. The application seeks injunctive relief restraining the 1st respondent from interfering or removing the applicant's horses from the stables on LR. No. 7373/6,7 and 8 Ngong View End Road, Karen Nairobi (the property).
2. The application is supported by the affidavit and supplementary affidavit sworn by Katherine Linda Moore, the applicant herein, on 1st November and 20th 2023. The application is opposed vide a replying and supplementary affidavit sworn by the respondent, David Seton on 7th and 28th November 2023.
3. It is not controverted that the applicant and the 1st respondent are shareholders and directors of the 2nd respondent Company whereby the applicant holds 25% shares, the 1st respondent 74 % and a third party, Nicholas Seton holds 1%. It is further not in issue that the 2nd respondent company is the exclusive registered owner of the said property.
4. Arising from this, my understanding of the applicant's case is that she and the 1st respondent are the beneficial owners of the suit property. The applicant's issue with the 1st respondent is that after their



fall out as a couple, the 1st respondent brought his brother, Nicholas Seton into the Company as a 3rd shareholder and appointed him a co-director, against the 3rd respondent's Memorandum and Articles of Association.

5. Because of this state of affairs, the applicant is not seeking to pursue a derivative claim against the respondents, but has opted to pursue a liquidation of the 2nd respondent. She therefore seeks to preserve her rights of access by having her horses remain stabled on the property pending the hearing and determination of the said petition.
6. The applicant takes issue with the respondent's action of blocking her access to the suit property and threatening to remove the horses pending the determination of the liquidation petition.
7. The respondent has asked this Court to dismiss the application as this Court lacks jurisdiction to determine the same. The respondent argues that the dispute is one of occupation and use of land which is a matter within the exclusive jurisdiction of the Environment and Land Court (ELC) as stipulated by Article 162 (2)(b) of the Constitution and section 13 of the ELC Act.
8. The respondent further urges that the matter herein is purely a petition seeking to wind up or liquidate 2nd respondent and therefore the application is not relevant.

Analysis

9. Before delving into the substance of the application, it behooves this Court to first of all establish at the outset, that it is clothed with the requisite jurisdiction to determine the matter at hand. The locus classicus case of Owners of the Motor Vessel "Lillian S" V Caltex Oil (Kenya) Ltd, [1989] eKLR and the Supreme Court's decision in the case of Samuel E Kamau Macharia V KCB & 2 Others, Civil Application No. 2 of 2011 serve as pivotal guides in this examination.
10. These decisions collectively underscore the fact that a Court's jurisdiction flows from either the Constitution or legislation or both and therefore, the Court cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law, not even by the consent of parties. It therefore follows that a Court acting without jurisdiction is acting in vain.
11. The jurisdiction of the commercial court in dealing with disputes related to company liquidation under section 425 of the Insolvency Act is not denied. The assertion by the respondent that disputes involving land and associated entitlements, particularly those with land use underpinnings, typically fall within the exclusive purview of the ELC, as delineated by the Constitution and the ELC Act is also a factual averment.
12. Fortunately, this Court has already pronounced itself in Suzanne Achieng Butler & 4 others V Redbill Heights Investments Limited & Another, [2016] eKLR that:

“...When faced with a controversy whether a particular case is a dispute about land (which should be litigated at the ELC) or not, the Courts utilize the pre-dominant purpose test...”
13. In applying this test to the present situation, I am of the view that the crux of the dispute before this Court revolves around property rights held by the company and how these rights affect the personal assets of shareholders, exemplified by the horses. The petition before this Court seeks to have the 2nd respondent liquidated for the reasons that the 1st respondent has poorly managed the 2nd respondent and sidelined the applicant in the management of the 2nd respondent. What is before the Court as I have already stated is an application by a shareholder to preserve her rights pending the determination of the liquidation petition.



14. It is therefore obvious that this dispute emerges in the context of a liquidation petition, ostensibly rendering it a company law issue rather than a land law dispute. This argument is strengthened by the principle that by virtue of the liquidation petition, the commercial court's jurisdiction encompasses disputes arising out of or connected with the company's affairs and its winding up, including disputes over the 2nd respondent company's assets.
15. I must add that no evidence has been produced by the respondents to prove that the 2nd respondent has sought 'legal redress in the appropriate Court' as averred in the replying affidavit. I therefore have no difficulty finding that this Court is seized with the necessary jurisdiction on this first point.
16. The 1st respondent's further argument that the reliefs sought in the application are not anchored in the petition is quite persuasive.
17. The Court notes that the liquidation petition dated 30th January 2023 does not plead any facts in relation to the suit property or the specific issue of the horses' residence within said property. While Prayer (d) of the petition calls for a permanent injunction against interference with the respondent company's assets, it does not specifically address the suit property or assert joint ownership thereof.
18. This Court concurs with the applicant that an application for an injunction should ideally be grounded in the substantive claim made in the main petition. Therefore, the facts that support the application for an injunction must logically stem from, and be directly related to, the facts and claims outlined in the main plaint or petition. This helps to avoid ambiguity and prevents the other party from being taken by surprise.
19. While I largely agree with the respondents, the question would then be whether the infraction is excusable or not. I am guided in this enquiry by this Court's pronouncement in *Dominion Farm Limited V African Nature Stream & Another*, Kisumu HCCC No. 21 of 2006. The Court found as follows:

“Whereas the rules of procedure are not made in vain and are not to be ignored, often times the Courts will encounter inadvertent transgressions or unintentional or ill-advised omissions through defective, disorderly and incompetent use of procedure but which if strictly observed may give rise to substantial injustice and in such circumstances, the exercise of the discretion of the Court comes into play to salvage the situation for the ends of justice.”
20. In the application before the Court, the parties are well known to each other and well aware of their dispute. The material issues of joint directorship, ownership of the subject property by the 2nd respondent and the stabling of the horses is undisputed. The respondents have also had ample opportunity to respond to the application filed by the petitioner.
21. While the applicant is therefore guilty of deviating from procedure, I do not think that such lapse in procedure goes to the jurisdiction of this Court. Even more, I do not find that there has been any fundamental prejudice on the respondent.
22. In the circumstances, I do concur with the observation by Ringera, J (as he then was), in the case of *Microsoft Corporation V Mitsumi Computer Garage Ltd & Another*, Nairobi (Milimani) HCCC No. 810 of 2001 [2001] KLR 470; [2001] 2 EA 460. The Learned Judge found as follows:

“Deviations from or lapses in form or procedure, which do not go to the jurisdiction of the Court or prejudice the adverse party in any fundamental respect, ought not be treated as



nullifying the legal instruments thus affected and the Court should rise to its higher calling to do justice by saving the proceedings in issue.”

23. Considering the tenor of section 1A, 1B and 3A of the [Civil Procedure Act](#) and in the interest of a just, efficient determination and considering the need for proportionality, I therefore decline to strike out the application on this ground.
24. Turning now to the application for injunction, 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) EA 385.
25. Briefly the test requires that:
 - i. An applicant must show a prima facie case with a probability of success.
 - ii. 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.
 - iii. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.
26. The enquiry as to whether the petitioner has established a *prima facie* case is led by the decision in [Mrao Ltd V First American Bank of Kenya Ltd & 2 Others](#), [2003] KLR 125. The Court defined such a case as one 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...a *prima facie* case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of the applicant's case upon trial. That is clearly a standard which is higher than an arguable case.”
27. In determining whether a *prima facie* case has been demonstrated by the petitioner, I am in turn cognizant of the limitations of enquiry that are permitted of this court at this point in time as laid down in by the Court of Appeal in [Nguruman Ltd V Jan Bonde Nielsen & 2 Others](#), [2014] eKLR.
28. As earlier stated, the predominant issue in this dispute is not whether the horses belong to the 2nd respondent as argued by the 1st respondent. I understand the issue to be whether the applicant has any rights of access and use of the assets of the company, for stabling her horses, pending the liquidation of the 2nd respondent Company.
29. Ultimately the Court will have to determine whether there exists a beneficial ownership in the suit property held by the 2nd respondent by virtue of the joint shareholding in the Company and therefore whether the petitioner and the respondent are both entitled to the administration and management of the 2nd respondent's assets.
30. Since the dispute revolves around the rights and interests of shareholders and directors within the context of a company's liquidation, specifically regarding the use and control of company assets (the property and by extension, the horses located on it), I am convinced that the petitioner has established that she has a prima facie case which raises substantive issues for determination at the hearing of the suit.
31. On the 2nd limb, the argument that the deterioration of the health, well-being and safety of the applicant's horses will be compromised, and will be irreparably impaired and such loss and harm



cannot be compensated by damages is convincing to this Court. I take the view that no prejudice will be occasioned to the respondents by the Court allowing the prayers sought. As such, the balance of convenience tilts in favour of allowing the application. In any case, any losses that will have been incurred by the respondents arising from this can be considered in the final determination of the petition.

32. Before I pen off, this Court maintains that this is a dispute that is ideal for mediation and it would serve the parties better if the same was expeditiously concluded through Court Annexed Mediation.

Disposition

33. The application dated 1st November 2023 is allowed. Each party shall bear their costs.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 14TH DAY OF MAY 2024.

F. MUGAMBI

JUDGE

