



**Directline Assurance Company Limited v Macharia & 11 others (Civil Case E328 of 2024)
[2024] KEHC 11885 (KLR) (Commercial and Tax) (4 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 11885 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE E328 OF 2024
A MABEYA, J
OCTOBER 4, 2024**

BETWEEN

DIRECTLINE ASSURANCE COMPANY LIMITED PLAINTIFF

AND

**DR. SAMUEL KAMAU MACHARIA 1ST DEFENDANT
BASHIR MBURU 2ND DEFENDANT
JULIUS ORENGE 3RD DEFENDANT
KELVIN MOGENI 4TH DEFENDANT
SALOME GITOHO 5TH DEFENDANT
TOY AND SUNA HOLDINGS LIMITED 6TH DEFENDANT
DIAMOND TRUST BANK LIMITED 7TH DEFENDANT
EQUITY BANK KENYA LIMITED 8TH DEFENDANT
FAMILY BANK LIMITED 9TH DEFENDANT
I&M BANK LIMITED 10TH DEFENDANT
INSURANCE REGULATORY AUTHORITY 11TH DEFENDANT
ATANAS MAINA 12TH DEFENDANT**

RULING

1. Before Court are two applications, the application by the plaintiff dated 16/6/2024 and the application by the defendant dated 18/7/2024. The application by the defendant dated 18/7/2024 sought a



- declaration that the firm of Andrew Mmbogori & Co. Advocates was not appointed by the 1st respondent. This application has been heard and decided in MISC E470 of 2024 and therefore spent. The Court will therefore proceed with the plaintiff's application dated 16/6/2024.
2. The application is brought under section 1A, 1B, 3, 3A and 63(e) of the Civil Procedure Rules. The application seeks orders to the effect that the 1st to 10th respondent be prohibited from making any withdrawals, transfers or other transactions that could encumber the funds or lead to their removal from the specified bank accounts, namely;
 - i. Diamond Trust Bank Limited account number 08013xxxxx
 - ii. Equity Bank Limited account no 08802902xxxxx
 - iii. Family Bank account no 30000xxxxx
 - iv. And any other bank account in the name of or on behalf of the plaintiff.
 3. The application further sought that the 1st to 7th and 12th defendant/respondent be prohibited from withdrawing, transferring or conducting any transactions regarding the Kshs 400,000,000/- ("the said amount") held in the 6th defendant/respondent's account. Additionally, that the 1st to 6th and 12th defendant be restrained from terminating or hiring any new employees or interfering with existing contracts. It further sought to restrain the 1st to 6th respondent from physically accessing the plaintiff/applicant's premises at Hazina Towers or any other location.
 4. Finally, the application sought that a temporary joint board be established, consisting of three nominees from the plaintiff/applicant's shareholders and three from the 1st respondent.
 5. The application was backed by the grounds outlined in the body of the Motion and the affidavit of Terry Wenje sworn on 16/6/2024. She stated that she was a director, founder and shareholder of the applicant since 19/11/2012. Although she was approved by the IRA to serve as a director and principal officer, her employment was terminated by the applicant through a letter dated 30/8/2019, signed by the 1st respondent. This termination was later overturned by the tribunal in a judgment dated 27/2/2020.
 6. That she holds a 20% share in Janus Limited and that the majority shareholder, John, passed away intestate, leaving behind his children. Following his demise, disputes arose regarding shareholding and directorship. The 1st respondent, his wife and Royal Credit Limited held 9.664%, while Akm Investments Limited, Janus Limited, Sure Invest Company Limited, Stenny Investment Pty Limited, and Triad Networks Limited collectively held 90.336%. The plaintiff's takeover involved irregular appointments of additional directors which contravenes section 223 of the *Companies Act*.
 7. She further averred that the ownership dispute of the company was referred to arbitration resulting in an award published on 22/6/2022. That applications for recognition and enforcement of this award, as well as for setting it aside, are currently pending before the High Court. It was argued that at the time the award was issued, the minority shareholders engaged in illegal actions, including terminating her employment, appointing new CEOs and principal officers, and removing and appointing new directors. These actions were reported to the registrar of companies, who deemed the resolutions of 18th and 19th March, 2020 to be illegal and void.
 8. She contended that on 11/11/2022, a resolution to revoke the existing bank mandates held by Dr. Macharia, Bashir Mburu, and Mr. Evans Nyaga was passed. The banks awaited feedback from the applicant before changing these mandates. That the 11th respondent "the IRA", had contravened



- section 27A(b) of the Insurance Act by refusing to process the approval of the company's directors, pending the outcome of the arbitration award.
9. Consequently, the 11th respondent had imposed a restriction preventing the plaintiff's shareholders from exercising their rights and the duly elected directors from assuming office. As a result, the appointed directors have been excluded from company operations, while the 1st respondent and the 2nd to 5th respondent have allegedly engaged in fraudulent activities against the company. In the premises, the Court was urged to grant the orders sought.
 10. The 12th defendant opposed the application vide a replying affidavit sworn by ATANAS MAINA on 26/7/2024. He stated that at about 6/4/2020, he was appointed as the plaintiff's company secretary. That he had been working with a board of directors duly appointed by the majority shareholders and approved by the 11th defendant. That in his role as company secretary, he continued to act in the best interest of the plaintiff.
 11. The IRA opposed the application vide a replying affidavit sworn by the Commissioner of Insurance Godfrey K. Kiptum on 31/7/2024. He contended that the IRA could not approve any of the directors since the shareholding of the company was in dispute. That interim measures of protection ought to be issued as per the consent dated 3/7/2024.
 12. The 3rd defendant filed a replying affidavit sworn by JULIUS ORENGE on 5/8/2024. He asserted that Terry Wanjiku Wijenje was neither a founder nor shareholder/director of the plaintiff. That the actual founders were Royal Credit Limited, Samuel Kamau Macharia, Purity Kamau Macharia and Dan Karobia.
 13. He contended that, Janus Ltd had never paid for the shares it claims to own, and therefore, cannot be considered a bona fide shareholder. That the disputes regarding shareholding are currently pending before Court, which is yet to determine the bona fide shareholders versus the minority shareholder. That Terry Wanjiku Wijenje, Lisa Ameyna Anyango, Kimamo Kuria, Tom Otieno Odongo, and Jackson Kionga Kamau had not been approved as directors by the IRA and therefore lacked the authority to manage the affairs of the plaintiff.
 14. The application was canvassed by way of written submissions which I have considered.
 15. The plaintiff argued that it had established a prima facie case, noting that the 1st to 5th and 12th defendant were removed from the plaintiff's register of directors. The registrar's ruling delivered on 12/10/2022 had never been set aside, stayed or varied. It was further contended that according to the CR12, the 1st respondent was a minority shareholder without the authority to act unilaterally on behalf of the plaintiff.
 16. That the 1st and 3rd respondent had passed an illegal board resolution that committed the plaintiff's funds, totaling Kshs 500,000,000/-, held in account number 30000xxxxx at the 9th defendant bank. The plaintiff asserted that unless restrained, the defendants were likely to continue defrauding the plaintiff through further fraudulent transactions.
 17. Counsel argued that the plaintiff's CR12 should serve as a definitive proof of who was an authorized officer of the company. That therefore, the 1st to 6th respondent should be prohibited from acting on behalf of the plaintiff. Regarding whether the plaintiff would suffer irreparable harm, counsel submitted that the defendants' actions had resulted in losses of at least Kshs. 700,000,000, which may not be recoverable. The plaintiff requested that a temporary board be appointed to manage the company's affairs in accordance with the consent agreement entered into by the parties.



18. The 12th respondent argued that the plaintiff had not demonstrated a prima facie case with a probability of success. Furthermore, that the plaintiff would not suffer any harm if the requested orders were not granted. Counsel maintained that the plaintiff's application lacked merit and should be dismissed.
19. The IRA submitted that the issue of approving or disapproving directors should not be considered at this stage, given the ongoing dispute regarding the company's shareholding. Counsel indicated that the IRA did not object to the formation of an interim joint board of directors, which would include two nominees from Janus Limited, two from AKM Investment Limited and one from Royal Credit Limited. That this arrangement will align with section 67C(2)(iii) of the *Insurance Act* CAP 487 ("the Act") which empowers the IRA to appoint three directors to the board of an insurance company.
20. The 1st to 6th defendant submitted that the IRA aimed at misleading the Court by ignoring the audit of shareholding in the plaintiff. They claimed that the parties had overlooked the findings of this audit. Counsel submitted that a forensic audit revealed that AKM Investment Limited had significantly mismanaged the company by siphoning approximately Kshs 7 billion. That the IRA and the plaintiff, as represented by AKM Investment Limited and Janus Limited, lacked any enforceable rights in Court.
21. I have reviewed the extensive pleadings submitted to Court, along with the responses and the submissions on record. The main issue at hand is whether the plaintiff has made a sufficient case for the grant of the orders sought.
22. The plaintiff has sought several prayers which I will categorize into two groups. The first set of prayers which I propose to deal with first are from prayer 18 to 27 in which the plaintiff seeks injunctive relief to restrain the 1st to 6th respondent from engaging in activities related to the plaintiff. The question is whether the criteria for granting injunctive relief have been met.
23. The principles are well known as set out in *Giella –versus- Cassman Brown and Company Limited* (1973) E.A 385. These are that an applicant must establish a prima facie case with a probability of success. That an injunction would ordinarily not issue unless the applicant demonstrates that he might suffer loss that cannot be compensated by an award of damages and finally, if the court is in doubt, it will determine the matter on a balance of convenience.
24. In determining what amounts to a prima facie case, the Court of Appeal in the case of *Mrao Limited –versus- First American Bank of Kenya and 2 Others* (2003) KLR 125, stated that: -

“A prima facie case in a Civil Case include but is not confined to a “genuine or arguable” case. It is a case which on the material presented to the court, a tribunal properly directing itself will conclude 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 but the evidence must show an infringement of a right, and the probability of success of the applicant’s case upon trial. That is clearly a standard, which is higher than an arguable case.”
25. In its pursuit for injunctive reliefs, the plaintiff sought to restrain the 1st to 6th defendant from withdrawing or having transactions with respect to the bank accounts held with the 6th respondent; from interfering with the employment of the staff by terminating or hiring, from acting on behalf of the plaintiff and accessing the plaintiff's premises. With respect to the IRA, the plaintiff sought that he should be compelled to approve the plaintiff's request for approval of its directors.
26. The plaintiff's case was that the 1st to 5th respondent ought to be prohibited from working on behalf of the plaintiff since the company's CR-12 was conclusive on who the directors were. It was the plaintiff's



- further contention that the 1st to 5th respondent had been struck out of the register of directors and the 1st respondent was a minority shareholder.
27. Further, the Court was informed that the respondents had perpetrated fraudulent activities with respect to illegal transfer of monies amounting to more than Kshs. 500 million. It is based on the foregoing that the plaintiff sought the injunctive reliefs.
 28. On its part, the IRA contended that the issues raised by the plaintiff are all concerned with the dispute on shareholding and the same was pending before another court for determination. It was further argued that due to the sensitive nature of the insurance industry, there ought to be an interim board appointed to run the affairs of the company even as the parties continued to deal with their dispute.
 29. On their part, the 1st to 6th respondents contended that based on the audit on the shareholding of 5/3/2024, it had been discovered that AKM Investments Limited had grossly mismanaged the company and they were the majority shareholders.
 30. I have considered all the rival contestations by the parties. An injunctive relief would only be granted where a party's right has been or is likely to be infringed upon, leading to potential harm that cannot be adequately remedied by monetary damages. It is well established that the management and decision-making of a company are the responsibilities of its directors, who are tasked with overseeing the company's day-to-day operations.
 31. These operations include the mandate for managing financial responsibilities, hiring new staff and overseeing other essential activities necessary for the company's effective functioning. Directors play a crucial role in ensuring that these tasks are carried out in compliance with the law and in the best interests of the company and its shareholders.
 32. In the present case, the injunctive reliefs sought by the plaintiff are geared towards the protection of these responsibilities in management of the company. The Court is alive to the fact that granting these orders would effectively bar the respondents from participating in the company's management.
 33. The Court notes that there is an ongoing dispute regarding the company's shareholding that is currently pending resolution. The arbitration award is also before the Court and is yet to be either recognized and adopted or set aside. Until a determination is made on these matters, the Court finds it difficult to engage in issues related to the management and shareholding of the company.
 34. However, the company must continue as a business. The allegations levelled against the respondents are serious and may have an irreversible impact on the company by the time there is a resolution. It is alleged that the funds belonging to the company have been privatized by the 1st respondent by using a sum of Kshs. 500,000,000/- as security for personal securities advanced to him or companies associated with him.
 35. It is also alleged that the 1st respondent has also transferred from the company's account a sum of Kshs. 400,000,000/- to an account held by the 6th respondent.
 36. The aforesaid actions complained of are not only unfortunate and go against the known principles of prudent corporate governance, but are a recipe for chaos or collapse of the company. It should be had in mind that the plaintiff as an insurance company, deals with hundreds of thousands of Kenyans. If not properly managed, many policy holders as well as claimants for compensation will be left holding the short end of the stick! It is no longer a matter of private business between the disputants herein, but a matter of public interest. The interests of the insuring public must be protected.



37. In view of the foregoing, I am satisfied that not only has the plaintiff established a prima facie case, but has demonstrated that unless the actions of the respondents are reversed and they are restrained as sought, the plaintiff will suffer irreparable loss and damage.
38. In any event, the balance of convenience tilts in having a sense of sanity in the running of the plaintiff at least for the sake of the insuring public.
39. While the Court is alive to the cardinal principle of Company Law that courts should not micro-manage companies and that management of companies should be left to the hands of the shareholders and the directors, the present case is an exception. Left unchecked, the plaintiff will be headed to a collapse with the huge consequent losses and untold injury and suffering of the insuring public.
40. What commends itself to the Court is to issue the restraining orders and have an interim board of directors to run the affairs of the plaintiff pending the resolution of the issue of shareholding and directorship by the Court that is dealing with the arbitral award.
41. For the public interest expressed above, aware that the transfer of the said sum of Kshs.400,000,000/- by the 1st respondent to the account of the 6th respondent was not only unlawful and illegal meant to financially cripple the plaintiff, the Court will, under the prayer 'any other relief' and under section 3A of the *Civil Procedure Act* grant a summary order to return the said funds to the account of the plaintiff from where they were transferred. This is in order to meet the ends of justice and to secure the interest of the policy holders of the plaintiff and the claimants for compensation.
42. The Court recognizes the significance of the insurance business and its crucial role in providing financial protection and security to individuals and entities. An insurance company is a regulated entity. This means that it operates under strict compliance with the law. Given the margin of risk involved in its operations, it must adhere to regulatory standards that ensure financial stability and protect policyholders. That cannot be said of the plaintiff due to the unending and ongoing wrangles.
43. This is the best example of how not to manage or govern a company. It is poor corporate governance. The company's management is currently non-functional. This negatively impacts policyholders who require their claims to be addressed. If this situation persists, the company risks financial distress. Therefore, the court believes it is essential to establish a caretaker board of directors to ensure that the company's operations continue smoothly and that it can meet its obligations. Given that a consent had been entered by the parties, the composition of the board should align with the terms thereof.
44. I further find that, it essential that the books of accounts be audited to ascertain the financial position of the company as well as its overall status. Given these considerations, the Court acknowledges the need for careful oversight and adherence to regulatory standards to ensure the industry's integrity and reliability.
45. In view of the foregoing, the Court finds the plaintiff's application to be meritorious, allows the same and makes the following orders: -
 - a. Prayer nos. 18, 19, 20, 21, 22, 23, 24, 27, 30 and 31 are granted as prayed.
 - b. A temporary joint board be constituted forthwith consisting of 2 nominees each of AKM Investments Ltd, Janus Ltd and Royal Media Services Ltd.
 - c. An order hereby issues directed at the 7th respondent to forthwith re-transfer the sum of Kshs.400,000,000/- from Ac. No. 003xxxxx back to the plaintiff's account no. 08013xxxxx held with itself.



- d. The bank signatories be appointed by the interim board of directors.
- e. An order is hereby granted for the forensic audit of the plaintiff's books of account. This is to be complied with by the interim board and is to be undertaken within 90 days of the date hereof.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 4TH DAY OF OCTOBER, 2024.

A. MABEYA, FCI ARB

JUDGE

