



**Mutele v Weindaba & another (Miscellaneous Application E005 of 2023)
[2024] KEHC 12999 (KLR) (Family) (11 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 12999 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
MISCELLANEOUS APPLICATION E005 OF 2023
PM NYAUNDI, J
OCTOBER 11, 2024**

BETWEEN

AGNES NAMUNYAK MUTELE APPLICANT

AND

JAMES MUTELE WEINDABA 1ST RESPONDENT

JAMUWE LIMITED 2ND RESPONDENT

RULING

1. Vide Notice of Motion dated 27th June 2024 presented under Order 2 Rule 15 (1) (b) and (d), Order 52 Rule 1 of the Civil Procedure Rules, 2010 and Section 5 of the Civil Procedure Act the Applicant (Jamuwe Limited, 2nd Respondent in the main suit) seeks the following orders-
 1. That the Suit as against the 2nd Respondent be struck out
 2. That the Applicant be ordered to pay the costs of the suit.
2. The Application is supported by the Affidavit of Stephen Kiplagat Kipkenda, a director of the Company, sworn on even date. It is contended that this Court lacks jurisdiction to determine disputes relating to ownership of land and a dispute relating to alleged fraudulent shareholding in a company or any dispute arising under the Company's Act.
3. The 1st Respondent supports the application and has sworn affidavit on 21st August 2024. Like the 2nd Respondent he contends that the subject property belongs to the 2nd Respondent and this court does not have jurisdiction to determine the dispute between the Petitioner and the 2nd Respondent. It is his contention that the property Maisonette Number 4 gate number 7 erected on Land Reference Number 330/1069 at Diani Close, Ole Dume Road is not matrimonial property as it is registered in the name of the 2nd Respondent.



4. The Application was canvassed via written submissions.
5. In submissions dated 5th September 2024 the 2nd Respondent submits that the Court lacks jurisdiction to issue the orders that are sought. Reference is made to the following decisions; In the Matter of the Estate of Jayantilal Haribhai Bakrania (Deceased) [2018] eKLR, Pacific Frontier Limited vs Jane Mutuku Kyengo & Another [2021] KECA, Patrick Kibathi Kigwe & Rosemary Wanjiku Kigwe vs Charles Kigwe Gatheca [2015] eKLR and Vascoline Kajanu Mwanzia vs Jennifer Mueni Mutinda Kabeke [2022]eKLR. Substantially the Applicant submits that the Company is a distinct and separate entity from the 1st Respondent.
6. The 1st Applicant in submissions dated 6th September 2024 supports the Notice of Motion and asks that it be allowed with costs to the 2nd Respondent. Reliance is placed on the decisions in MJK V FM [2019] eKLR; NNN VSNM [2017] eKLR on the mandate of the family court as relates to property owned by a company. It is further submitted that it is the Environment and Land Court that has exclusive jurisdiction to hear and determine disputes relating to land and reference is made to the decision in Bank of Africa Kenya Limited & Anor v TSS Investment Limited & 2 Others [2024] KECA.

Analysis and Determination

7. Having considered the pleadings herein and submissions filed. I frame the following as the issues for determination
 1. Whether the suit as against the 2nd Respondent should be struck out
 2. Who should pay costs of the suit.
8. The Applicant seeks the following orders in respect to the ‘Ole Dume’ property
 1. That it be declared matrimonial property
 2. That stemming from 1 above a declaration issue that the property is unavailable for occupation, possession, inheritance or division as part of the estate in probate and administration of the estate of the 1st respondent in distribution to any of his other wives in the event of his demise
 3. That a permanent injunction does issue restraining the 1st respondent directly by himself or through his agents or proxies from harassing threatening abusing or evicting the Petitioner or her children or in any manner accessing, visiting, entering or attempting to enter access, lease sell, mortgage, alienate or in any way dispose of the property
 4. An order compelling the 1st and 2nd Respondents to transfer registration of the asset into the joint names of the Petitioner and the 1st Respondent within 30 days and in default the land registrar to effect the transfers in compliance with the order
 5. A declaration that the petitioner made both monetary and non-monetary contribution towards acquisition, development, furnishing and sustenance of the matrimonial home and is entitled to contributory share equivalent to 75% of their values while the 1st respondent is entitled to a share of 25% of their value
 6. An order be made that either the petitioner or the 1st respondent be at liberty to buy out the other spouses share of the contribution from the matrimonial properties and pay the other



the money equivalent to their contributory share and an official transfer of such interest be registered against the title as a decree of the court.

7. The sought orders are hinged on allegations of breach of trust as enumerated by the petitioner in paragraph 23 of the Originating summons to include
 - i. Transferring registration of the matrimonial property in Diani Close to the 2nd Respondent with (sic) the petitioner's knowledge and consent
 - ii. Illegally and fraudulently removing the petitioner as a director on 17th November 2009 and shareholder in the 2nd Respondent company on 25th October 2009 without notice to her in order to defraud her of her contribution
 - iii. Attempting to defraud the Petitioner of her contribution in the Lavington Property by getting her to service the fidelity commercial loan and then secretly and illegally removing her as director and shareholder.
9. It is common ground that property Maisonette Number 4 gate number 7 erected on Land Reference Number 330/1069 at Diani Close, Ole Dume Road is registered in the name of Jamuwe Limited.
10. The Petitioner contends that she contributed towards the purchase of the property and that she was irregularly removed from being a Shareholder of the Company with the intention of depriving her of her interest.
11. The Petitioner in essence is challenging the title of the 2nd Respondent to the Ole Dume property and the pertinent issue is whether this court is vested with the mandate to resolve that issue.
12. On almost similar facts the Court in [*NGV v CNV also known as CHM \(Matrimonial Cause 6 of 2021\)*](#) [2022] KEHC 16645 (KLR) (6 December 2022) (Judgment) stated as follows
 - (50)The question then begging an answer is, can this court share out assets including funds held in the name of the company in various banks. It is trite law that a limited liability company is a legal entity capable of suing or being sued and that division or distribution of its own assets can only be done under the [*Companies Act*](#). Since the shares are clearly identifiable which is not in dispute, this court has no business making a declaration that so and so holds any share in trust for the other.
 - (51) While dealing with a similar scenario, the court in the case of SNK vs MSK (supra) had this to say; 'The learned counsel did not give due regard to the settled principle of company law in Salomon vs Salomon (1897)AC that a company is a separate legal person from its share and directors'. At paragraph [23] the court went further to state that orders against a company can only be brought against a company under section 211 or 222(2) of the [*Companies Act*](#). This position was restated in JWC vs PBW (2017) eKLR and Nancy Wambui Ndichu vs Steve Ndichu Mwaura Nairobi HCCC No 43 of 2009(OS) in which the court held that division of matrimonial property does not include shares nor properties owned by a company as a company is a separate legal entity and that the court with jurisdiction is the commercial division of the high court.
 - (52) In view of the above case law, there is no doubt that the company in this case Plasma Diagnostic Ltd is a legal entity capable of suing or being sued. I agree with the applicant that any claim against the company herein including a claim of salary arrears by the respondent can only be ventilated before commercial division. Accordingly, all assets or accounts held in the name of the company are subject to the rules and regulations under the Memorandum of association



and Articles of Association of the company or generally the law governing limited liability companies (the *Companies Act*). To that extent, such company property or funds does not constitute matrimonial property to call upon division.

13. In light of the forgoing I find that the application has merit and allow it. Accordingly, the suit as against the 2nd respondent (Jamuwe Limited) is struck out.
14. Each party will bear their own costs.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 11TH DAY OF OCTOBER 2024.

M NYAUNDI

JUDGE

In the presence of:

Kiguatha Advocates for the Respondent

Kichwen Advocates for the 1st Respondent and holding brief for Bundotich for 2nd Respondent

Fardosa Court Assistant

