



**Mugambi Zakayo Nteere Enterprises Ltd & 2 others v Kabutu Enterprises Ltd & another (Civil Case E010 of 2022) [2023] KEHC 889 (KLR) (9 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 889 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
CIVIL CASE E010 OF 2022  
TW CHERERE, J  
FEBRUARY 9, 2023**

**BETWEEN**

**MUGAMBI ZAKAYO NTEERE ENTERPRISES LTD ..... 1<sup>ST</sup> PLAINTIFF**

**MUGAMBI NKIRUTA ENTERPRISES LTD ..... 2<sup>ND</sup> PLAINTIFF**

**SAMMY BUNDI & MARY MUGAMBI (SUING AS LEGAL REPRESENTATIVES  
OF THE ESTATE OF MUGAMBI NKIRUTA- DECEASED) ..... 3<sup>RD</sup> PLAINTIFF**

**AND**

**KABUTU ENTERPRISES LTD ..... 1<sup>ST</sup> DEFENDANT**

**GATOBU ENTERPRISES LTD ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

**Brief facts**

1. On 27<sup>th</sup> October, 2022, this court issued the following orders:
  1. The 3<sup>rd</sup> Plaintiff/ Applicants did not at the time of filing this suit have the legal capacity to represent the estate of Mugambi Nkiruta. The 3<sup>rd</sup> Plaintiff/Applicants are therefore struck out of this suit.
  2. The orders of temporary injunction sought in the notice of motion dated 17<sup>th</sup> August, 2022 are barred by Order 2 Rule 6(1) of the *Civil Procedure Rules* and are unsustainable.
  3. The order restraining the Respondents, their agents or anyone else acting on their authority from interfering and or withdrawing any funds from Cooperative Bank Account No. 011xxxxx and from interfering with the 1<sup>st</sup> Applicant's business operations, transactions and or assets or in any other way purporting to run the affairs of Mugambi Zakayo Nteere Enterprises



Ltd pending the hearing and determination of the derivative suit issued on 01<sup>st</sup> September, 2022 is set aside,

4. This suit is stayed pending the determination to be made in Nkubu SPMCC No. E036 of 2022 that was filed earlier
  5. The determination of whether leave to bring a derivative suit ought to be granted is similarly stayed pending the determination to be made in Nkubu SPMCC No. E036 of 2022 that was filed earlier
  6. Applicants shall bear the costs of this application
  7. Mention on 01<sup>st</sup> December, 2022 to confirm the outcome in Nkubu SPMCC No. E036 of 2022 and for further orders
2. By notice of motion dated 02<sup>nd</sup> November, 2022, Applicants seek the following orders:
1. The Honourable Court be pleased to lift, set aside and or vacate orders 4 and 5 of the ruling dated 27<sup>th</sup> October, 2022 pending the hearing and determination of the derivative suit
  2. Leave to amend the plaint be granted
  3. Costs be borne by Respondents
3. The application is based on grounds among others that:
1. Nkubu SPMCC No. E036 of 2022 was withdrawn by orders issued on 19<sup>th</sup> October, 2022
  2. 4<sup>th</sup> Plaintiff has obtained ad-litem to protect the interest of Mugambi Nkiruta issued on 25<sup>th</sup> August, 2022
4. The application is also supported by an affidavit sworn on 02<sup>nd</sup> November, 2022 by the first 3<sup>rd</sup> Applicant Sammy Bundi Mugambi reiterating the grounds on the face of the application.
5. Respondents opposed the application vide a replying affidavits sworn on 14<sup>th</sup> December, 2022 by Zaverio Gatobu M'Ithinji, a director of the 2<sup>nd</sup> Respondent. He avers that the application is filed by parties that were struck out of the suit and who cannot be conferred capacity to sue by a grant issued after filing of the suit. Reliance was made to *Trouistik Union International & another v Jane Mbeyu & another* [1993] eKLR.
6. I have considered the application in the light of the affidavits on record and annexures thereto and submissions on behalf of the Applicants.
7. Review of court orders is governed by Section 80 of the *Civil Procedure Act* which provides *inter alia*:-
- Any person who considers himself aggrieved—
- a. by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
  - b. by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.
8. The procedural provisions for review under Order 45 rule 1 of the *Civil Procedure Rules* provide that:-
- (1) Any person considering himself aggrieved—



- (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
  - (b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.
9. The Court of Appeal in *Anthony Gachara Ayub v Francis Mabinda Thinwa* [2014] eKLR restated the main grounds for review which are discovery of new and important matter or evidence; mistake or error apparent on the face of the record; or for any other sufficient reason and most importantly, the application has to be made without unreasonable delay.
10. By this court's ruling dated 27<sup>th</sup> October, 2022, this court found that the 3<sup>rd</sup> Applicants did not have capacity to sue for want of letters of administration to represent Mugambi Nkiruta. There is no dispute that they obtained letters of administration long after this suit was filed. The suit in Nkubu was also withdrawn after 27<sup>th</sup> October, 2022. Flowing from the above, the defect in the capacity to sue by the 3<sup>rd</sup> Applicants cannot be cured by an amendment to include the 3<sup>rd</sup> Applicants but by filing a fresh suit at a date after the letters of administration ad-litem were issued. However, the suit by the 1<sup>st</sup> and 2<sup>nd</sup> Respondent is still valid.
11. I have considered the application and the Applicants have not demonstrated discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by Applicants at the time when the ruling in issue was delivered, or some mistake or error apparent on the face of the record, or any any other sufficient reason for lifting, setting aside and or vacating orders 4 and 5 of the ruling dated 27<sup>th</sup> October, 2022.
12. Consequently, the notice of motion dated 02<sup>nd</sup> November, 2022 is allowed in the following terms:
  1. Application to lift, set aside and or vacate orders 4 and 5 of the ruling dated 27<sup>th</sup> October, 2022 pending the hearing and determination of the derivative suit is declined
  2. Except for inclusion of the 3<sup>rd</sup> Applicants, the 1<sup>st</sup> and 2<sup>nd</sup> Applicants are at liberty to amend the plaint as they deem necessary
  3. The amended plaint shall be filed and served within 21 days from toady's date
  4. Respondents shall file their defence within 14 days of service of the Amended Plaint
  5. 3<sup>rd</sup> Respondents shall bear the costs of this application
  6. This matter will be mentioned on 30<sup>th</sup> March, 2023 to confirm compliance with these orders and for further orders

**DELIVERED THIS 09<sup>th</sup> DAY OF February 2023**

**WAMAE. T. W. CHERERE**

**JUDGE**

Appearances



Court Assistant - Kinoti

For Applicants - Mr. Mwiti for Joshua Mwiti & Co. Advocates

For Respondent - Mr. Muriira for Mwenda, Mwarania, Akwalu & Co. Advocates

