



**Damon v Damon & 5 others (Commercial Case E655 of 2021)
[2023] KEHC 1644 (KLR) (Commercial and Tax) (10 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 1644 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E655 OF 2021
A MABEYA, J
MARCH 10, 2023**

BETWEEN

JACQUELINE MACK DAMON PLAINTIFF

AND

JEAN FRANCOIS RAYMOND LOIUS DAMON 1ST DEFENDANT

JACKSON LEMAYIAN MATIPE 2ND DEFENDANT

STEVE JODAYA 3RD DEFENDANT

MAWE MBILI LIMITED 4TH DEFENDANT

THE REGISTRAR OF COMPANIES 5TH DEFENDANT

THE ATTORNEY GENERAL 6TH DEFENDANT

RULING

1. Before Court is an application dated 22/11/2021. It was brought under section 1A, 1B 3 and 3A of the *Civil Procedure Act*, Orders 40 rule 1 and 51 rule 1 of the *Civil Procedure Rules*, and section 238, 239 and 782 of the *Company's Act*.
2. The application sought various restraining orders against the respondents. It sought orders to restrain the 1st, 2nd and 3rd respondent from dealing or interfering in any manner with the 4th respondent and its assets and that they return any converted property to the 4th respondent within 14 days.
3. It also sought to restrain the 5th respondent from effecting any changes in shareholding and directorship of the 4th respondent and from acting on any documentation of the 4th defendant founded on the impugned resolution passed on 16/1/2019 appointing the 2nd and 3rd respondent as directors of the 4th



- respondent. It also sought orders that the 2nd and 3rd respondent be restrained from acting as directors of the 4th respondent.
4. The grounds for the application were set out on the face of it and on the Supporting Affidavit sworn by Jacqueline Mack Damon on 22/9/2021. It was contended that the suit was filed by the applicant, the 4th respondent's (company) shareholder as a derivative claim pursuant to the orders of Muigai J in Misc. E157 of 2019.
 5. That when upon filing of this suit, Misc. E157 of 2019 was closed and the restraining orders granted therein against the respondents extinguished. That the 1st and 2nd respondent had since conducted harmful acts against the company including intention to sell its asset being motor vehicle reg. KAM 035Z which had been advertised for sale and authorizing the unlawful occupation of the company's premises to Sleeping Warrior Lodge.
 6. That the 1st respondent was also a director/shareholder of the company and married and later divorced the applicant. That the 1st respondent unlawfully appointed the 2nd and 3rd respondent as the company directors on 16/1/2019 and appointed one Paulina Wairimu Munyua as company secretary through fictitious documents lodged with the registrar.
 7. That he had also unlawfully appointed one Solomon Avina as a director and they jointly removed the applicant as a signatory to the Company's bank account at Standard Chartered and Equity Bank, and illegally withdrew Kshs. 300,000/=, USD 2000/= and USD 1400/= from the company's accounts. That the 1st respondent also unilaterally allocated himself 797 ordinary shares on 7/3/2019 to get undue advantage over decisions.
 8. The applicant further contended that the 1st respondent had embezzled the company's funds and breached his fiduciaries duties by negligently running the company causing losses of Kshs.123,669,169/=. That he also sought to unlawfully convert the company's lease over its property erected on LR No. 9362/4 to another company, withdrew a suit instituted to challenge an eviction notice to the company contrary to the best interest of the company. That it was thus imperative that the orders sought be granted.
 9. The 3rd respondent supported the application vide his replying affidavit sworn on 16/11/2021. Interestingly, he averred that despite him being registered as a director of the company, the same was merely on paper as all acts done on the strength of any resolutions he signed were done without his consultation or involvement. That his role was only to append his signature. That he was a benefactor of the 1st respondent who sponsored his education and offered him employment and he was thus loyal to the 1st respondent and was under his instructions.
 10. That he never received legal advice or read any documents before signing. That the 1st respondent never issued notices for meetings and no voting was conducted before a decision was passed. That Solomon Avina's signature was forged on company documents and resolutions and other documents such as application for a duplicate logbook and sale of motor vehicle KAM 035Z. That any action done by him was out of exertion, undue influence and coercion by the 1st respondent.
 11. The 1st and 2nd respondent opposed the application vide the replying affidavit of Jackson Lemaiyan Matipe sworn on 11/10/2021. It was contended that Misc. E157 of 2021, was never heard and leave to institute a derivative suit was never given. That the suit was abandoned and case closed in a shrouded manner and the current suit was not a derivative suit.



12. The allegations raised against the respondents were denied and it was contended that the 2nd and 3rd respondent's appointment as directors was not fraudulent and the same had been duly registered at the companies registry after a resolution of the board meeting was passed (JLM 3).
13. That any investigation conducted by the applicant was unauthorized and not initiated by the company. That the 1st and 2nd respondent never intended to sell the company's motor vehicle as alleged. That it was the applicant who acted unlawfully by unilaterally taking action such as firing the company's employees, terminating contractual services, appointing new persons, unilaterally filing cases without resolutions, withdrawing funds from the company's account, selling the company's assets such as motor vehicle KAN 599Q and KZH 617 amongst other allegations.
14. That the other company Sleeping Warrior Lodge was destroyed in a fire in March 2017 and was no longer a going concern. That there were around 17 other suits between the parties and others not before court such that running of the company had become impossible. That the bad relationship between the applicant and 1st respondent would not allow the company to resume its business when both of them were on the board and as shareholders.
15. The application was disposed of by way of written submissions. The applicant's submissions were dated 2/12/2021 while those of the respondents were dated 29/11/2021. The main issue for consideration is whether the application has met the test for granting of injunctive orders.
16. However, this Court needs to first consider whether the instant suit is a derivative suit, as a challenge was raised by the 1st and 2nd respondent. The Court has seen the Court's orders of 28/6/2021 marked as JMD 2b in the application. Order 1 provides that
 1. The plaint and summons shall be served to the parties in E655/2021
17. In Misc. E157 of 2019, the court granted the applicant leave to continue with the derivative suit as prayed for in prayer 7 of the application dated 13/5/2019 with a rider that the plaint and summons was to be served to the parties in the instant suit. The court then proceeded to close that file.
18. The foregoing confirms that this suit is a derivative suit leave having been properly granted.
19. Section 238 (1) of the *Companies Act* provides that a derivative claim is brought by a member of a company in respect of a cause of action vested in the company, and seeking relief on behalf of the company. The application herein meets those stands. The applicant is a member of the company and the cause of action is vested in the company. From the prayers in the plaint dated 26/6/2021, it is clear that the reliefs are on behalf of the company despite the fact that the applicant and 1st respondent have personal differences stemming from their divorce.
20. This is an injunction application. The conditions for consideration in granting an injunction were settled in the case of *Giella v Cassman Brown & Company Limited* (1973) E A 358. In that case, it was held that a party must first show a prima facie case with a probability of success, secondly, he must show that that he might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages and thirdly, if the court is in doubt, it will decide an application on the balance of convenience.
21. On prima facie case, the applicant contended that the 1st respondent acted in breach of his fiduciary duties as a director and had acted against the best interest of the company. A case was established for the questionable appointment of the 2nd and 3rd directorship in the company without convening a general meeting as required. That if one was conducted, the applicant was excluded. There are also claims of



illegal withdrawals of the company funds, intention to sell the company's assets, unlawful allotment of shares, among other claims.

22. In *R. J. R. Macdonald v Canada (Attorney General)*, which was cited with approval in *Paul Gitonga Wanjau v Gatbuti Tea Factory Company Ltd & 2 others* [2016] eKLR the principles of injunction were well captured as follows: -

- “ i) Is there a serious issue to be tried?
- ii) Will the applicant suffer irreparable harm if the injunction is not granted?
- iii) Which party will suffer the greater harm from granting or refusing the remedy pending a decision on the merits? (often called "balance of convenience")

23. Serious issues have been raised by both parties including embezzlement of company funds, unilateral and unauthorized sale of company assets, unilateral actions without the company's authorization or resolution, unlawful appointments of directorships and unlawful allotment of shares. Further, there are allegations of withdrawal of cases that was prejudicial to the Company. All these are serious triable issues which adversely affect the company which has become a victim of actions of the 1st respondent's 'war' against the applicant.

24. According to the company minutes of the various meetings held by the 1st respondent and other members, the applicant was not present and there was no evidence of a notice for those meetings. The Court notes that most decisions, such as the appointment of the 2nd and 3rd respondent as directors and allotment of shares to the 1st respondent were made in those meetings and in the absence of the applicant who did not have notice of the same. The investigation report by PKF dated 1/1/2007 also reveals several fraudulent actions which casts doubts on the conduct of the 1st respondent. Consequently, a prima facie case with a probability of success has been established.

25. On whether the company will suffer irreparable harm if the orders sought are not issued, the answer is in the positive. If indeed the allegations raised by the applicant and 3rd respondent against the 1st & 2nd respondent are found to be true, then the company would suffer irreparable harm if its assets are not preserved before the determination of the suit.

26. For instance, its assets would continue to diminish and its membership unlawfully altered. It then goes that the company would suffer the greatest harm if left unpreserved.

27. As regards the balance of convenience, this obviously lies with preserving the status of company as it were before the alleged illegal acts.

28. The upshot is that the application has met the standards of granting of an injunctive order. Accordingly, the following orders are issued: -

- a) The 1st respondent is restrained from selling, transferring, or in any manner disposing of any property, asset or equipment registered in the name of the 4th respondent name or acquired by or through the 4th respondent's finances pending the hearing and determination of the suit.
- b) The 2nd and 3rd respondent's appointment as directors of the 4th respondent is stayed pending the hearing and determination of the suit. The 2nd and 3rd respondent are restrained from taking any action for and on behalf of the company pending the hearing and determination of the suit.
- c) The 5th respondent is restrained from making any alterations to the 4th respondent's records at the company registry pending the hearing and determination of the suit. Any alterations



already made pursuant to the impugned actions are to be cancelled forthwith pending the determination of this suit.

d) The applicant will have the costs of the suit.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 10TH DAY MARCH, 2023

A. MABEYA, FCIArb

JUDGE

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