



Mbogo v Dullo & 2 others; Waridi Utawala School Ltd (Affected Party) (Civil Case E004 of 2022) [2023] KEHC 1807 (KLR) (2 March 2023) (Ruling)

Neutral citation: [2023] KEHC 1807 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL CASE E004 OF 2022
MW MUIGAI, J
MARCH 2, 2023**

BETWEEN

ANASTASIA WAKUTHI MBOGO PLAINTIFF

AND

EUNICE ANN DULLO 1ST DEFENDANT

CATHERINE ACHIENG ODERO 2ND DEFENDANT

JAMES CHEGE MUSILA 3RD DEFENDANT

AND

WARIDI UTAWALA SCHOOL LTD AFFECTED PARTY

RULING

1. The suit commenced by Plaintiff dated 22nd of March, 2022. The plaintiff together with the 1st, 2nd and 3rd Defendants are the shareholders-directors of the affected party; Waridi Utawala School Limited Company in which they hold equal shares. Each held 20 shares, valued at Kshs 1,000 and at a nominal value of Kshs 20,000.
2. The affected Party Company is in the business of providing basic education and operates a primary school located at Utawala, Machakos County. The Plaintiff deposed that she contributed Kshs 600,000/- on diverse dates in 2020 and 2021 to boost the cash flow and working capital of the Affected Party, Waridi Utawala School Limited Company.
3. The 1st, 2nd, and 3rd Defendants have never acknowledged or disclosed to the Board of Directors of the Affected Party their monetary contribution to the Waridi Utawala School Limited Company; the affected Party's share capital, working capital and cash flow requirements.



4. The plaintiff prayed that judgment be entered against the Defendants jointly and severally for:
- a. Payment of Kshs 91,870 and Kshs 161,666 being the outstanding amount due to the plaintiff as dividends as at 31st December, 2021 and 28th February, 2022 respectively;
 - b. Payment of Kshs 30,000 per month with effect from October 2021 to date being monthly salary drawn by the Defendants to the exclusion of the Plaintiff;
 - c. Interest on (a) and (b) above at court rates;
 - d. Permanent injunction restraining the Defendants, their servants, agents or employees from varying, interfering, transferring and effecting changes to the share capital structure, membership or directorship of the company.
 - e. Permanent injunction restraining the Defendants, their servants, agents or employees from varying, reducing, diluting, interfering or dealing with the Plaintiff's shareholding in the Affected Party Company; Waridi Utawala School Limited Company;
 - a. Orders that all revenue collections or income of the company be collected, channelled or deposited to the authorized bank and registered money accounts registered in the name of the company; Waridi Utawala School Limited Company;
 - b. Orders directing that all the directors of the company must approve and sign off on all financial dealings of the company including, but not limited to bank and financial withdrawals and expenditure of any nature from the company's accounts;
 - c. Orders that any remuneration, dividend, emoluments, honoraria, drawings, salary or payments of whatever nature payable to directors shall be equal or subject to service, level contract approved by all the Directors of the Affected Party Company.
 - d. Order that the management of the Affected Party's business be vested in competent and qualified professionals answerable to the Board of Directors;
 - e. Orders that the Affected Party shall establish and implement proper cooperate governance structure in line with well-established international standards;
 - f. Orders that the Affected Party shall recruit a competent and qualified auditor appointed and approved by all Directors to undertake a comprehensive audit of the Affected Party's accounts and affairs with effect from the date of incorporation
 - g. Cost of this suit; and



- h. Such further orders that this Honourable Court may deem fit and just to grant.

Defence

5. The Defendants filed their defence in form of Replying Affidavit sworn by Catherine Achieng Odera on behalf of 1st, 3rd and the Affected Party dated 1st June, 2022 in which she opposed the application dated 22/3/2022. The Defendant deposed that the said Waridi Utawala School had three proprietors namely 1st & 3rd Respondents and herself.
6. That prior to incorporation of the Affected Party there existed Waridi Utawala School which was started in May 2019; that the school had always been under day to day management of the 1st and 3rd Respondents by the fact that they are teachers.
7. In August 2020 the Plaintiff approached them and expressed her wish to join in to share in their goal of offering quality education and resolved to convert the business name Waridi Utawala School to a Limited Company being Waridi Utawala School Limited currently the Affected Party.
8. That the proposed four directors were to be allotted twenty shares each. The Deponent deposed that the 1st 2nd and 3rd Respondent already had a school that was running and had physical structures and materials and clientele base considered as their capital contribution into the Affected Party.
9. It was agreed that the Applicant would make a capital contribution of Ksh 1,100,000 in payment of 20 shares that would be allotted to her at the incorporation of Waridi Utawala School Limited.
10. That the Applicant made a down payment of 500,000/= and later 100,000/= totalling to Kshs 600,000/= only as the Plaintiff's capital contribution. Meanwhile, Waridi Utawala School Limited; the Affected party continued operating a previous bank account which was later changed, the Plaintiff was included as a signatory.
11. That the financial audit for the 2020-2021 was undertaken by Shilasi and Associates who were appointed by the Board on 15/12/2021 and deposed that directors resolved to pay an allowance of Kshs 20,000 /= per month to each director including the Plaintiff. Things went well until 2021 when 1st and 3rd Respondents started complaining about the Plaintiff's misconduct; the Plaintiff demanded payment of salary yet she was not an employee of the school.
12. The Plaintiff, the applicant also exhibited monumental incompetence, unprofessionalism, lack of integrity, transparency, accountability and good faith and it is in the interest of justice that she be declared unfit to holding office as a director. She deposed that the application be dismissed with cost to the Respondents.

Applicant's/plaintiff's Submissions

13. The Plaintiff filed submissions on 7th October, 2022 in which two issues were raised for determination:
 - i. Whether the Plaintiff/Applicant is entitled to leave to continue the derivative action herein?
 - ii. whether the Plaintiff/Applicant is entitled to interim measures of protection of the Affected Party Company pending the determination of the suit?
14. On the first issue of Whether the Plaintiff/Applicant is entitled to leave to continue the derivative action herein? It was opined that derivative action is a mechanism which allows a shareholder to litigate



- on behalf of the company against an insider for acts of omissions involving negligence, default, breach of duty or breach of trust reliance was placed in Sections 238-241 of the *Companies Act*.
15. Section 239 (1) of the *Companies Act* provides inter alia, in order to continue a derivative claim brought under this Part by a member, the member has to apply to the Court for permission to continue it.
 16. It was submitted that an application for leave can be filed either before the filing of a derivative suit or after its filing to continue such suit and relied in the Court of Appeal case *Amin Manji & 2 Others vs Altaf Abdulrasul Dadani & Another (2015) eKLR*, held as follows:-

“leave of the court shall be obtained before filing of a derivative suit but may also be obtained to continue with the suit once filed..”
 17. It was submitted that the permission to proceed with a derivative suit under Sections 239-240 *Companies Act* is a preserve of the High Court and relied on Hon. A. Mabeja J in the case of *Arnold Kipkirui Langat VS Atticon Limited & 7 Others 2021 e KLR*, who stated as follows;

“the Court holds the view that in so far as the said suit was brought for the benefit of the company, the 7th defendant, that was a derivative suit and the competent court was the High Court and not the Chief Magistrates Court (the Senior Resident Magistrate for that matter) ...”
 18. They further averred that Section 239 (2) of the *Companies Act* provides for that application for leave will only be granted if the evidence adduced in support of it discloses a case that is a meritorious claim reliance was made to the case of *Isaiah Waweru Njumi & 2 others v Muturi Ndungu (2016) eKLR*.
 19. They submitted that the 1st, 2nd & 3rd Defendants had engaged in acts and omissions involving negligence, default, breach of duty and breach of trust as directors and the abuse of majority power for the oppression of the minority shareholder including among other things registering and operating a similar and competing business to the exclusion of the plaintiff, operating and collecting funds through an unauthorized bank account of a 3rd party, paying themselves higher dividends than the Plaintiff etcetera.
 20. As to the 2nd issue of whether the Plaintiff/Applicant is entitled to interim measures of protection of the Affected Party Company pending the determination of the suit? They submitted that the conditions for grant of interlocutory reliefs are well set in *Giella v Cassman Brown and co. ltd 1973* and *Mrao vs First American Bank of Kenya ltd & 2 Others 2003 KLR 125*. In which they averred that an Applicant must establish a prima facie case with the possibility of success, he will suffer irreparable damage unless orders are granted and where court is in doubt on the balance of convenience
 21. They submitted that Plaintiff's supporting affidavit are arguable and therefore meritable as there is evidence to prove that the 1st, 2nd, and 3rd Respondent have engaged in acts and omissions of negligence, default and breach of duty or trust.
 22. As to irreparable harm it on the plaintiff's submission that the injunctive orders sought if not granted the Affected Party will suffer financial mismanagement, waste and loss of assets of the company.
 23. Submission was that court is called upon to balance the between the preservation of the Affected Party's assets and the need to promote continuity in business for the affected party
 24. Finally, plaintiff opined that the Applicant is a minority shareholder who is at a greater disadvantage as compared to the 1st, 2nd and 3rd Defendants.



1st, 2nd & 3rd Defendant's Submissions

25. Defendants filed their submissions on 14th November, 2022 in which they raised two issues for determination:
- a. Is the Plaintiff entitled to permission to continue the derivative action and if so, on what terms
 - b. Whether the Plaintiff is entitled to interim reliefs prayed for in the application.
26. Submitting on the first issue on Is the Plaintiff entitled to permission to continue the derivative action and if so, on what terms, it was averred that the claim does not merit a derivative suit status. They relied on *Nurcombe v Nurcombe* (1984) ALL ER 65 and *Ghelani Metals Limited & 3 others vs Elesh Ghelani Natwarlal & another* (2017) eKLR, and submitted the Plaintiff is not acting in the interest of the Company and the Plaintiff's lack of candor and disinterest in the success and affairs of Waridi Utawala Limited are quite telling. They further relied on paragraph 13 of the Plaintiff's submissions that to them is a list of issues complained of as the wrongdoing of the company. They also relied on their replying affidavit
27. They opined that the company is in a sound financial position and not as the Plaintiff sensationally alludes. Reliance was placed in the case of *Wallersteiner vs Moir (No.2)* (1975) 1 ALLER 849
28. They submitted that there is no prima facie case that the Plaintiff has placed before the Honorable court. What the plaintiff submitted fails the test.
29. In plaintiff's submissions is opined that under Section 238(3) the derivative action can only be brought in respect of a cause of action arising from an actual or proposed act, omission involving negligence, default, breach of duty or trust by a director of the company that the Plaintiff placed her reliance on the case of *Isaiah Waweru Njumi & 2 Others vs Muturi Ndungu* (2016) eKLR where the court held that:
- "...among other things, the Court considers the following factors:
- a. Whether the Plaintiff has pleaded particularized facts which plausibly reveal a cause of action against the proposed defendants. If the pleaded cause of action is against the directors, the pleaded facts must be sufficiently particularized to create a reasonable doubt whether the board of directors' challenged actions or omissions deserve protection under the business judgment rule in determining whether they breached their duty of care or loyalty;
 - b. Whether the Plaintiff has made any efforts to bring about the action the Plaintiff desires from the directors or from the shareholders. Our Courts have developed this into a demand or futility requirement where a Plaintiff is required to either demonstrate that they made a demand on the board of directors or such a demand is excused;
 - c. Whether the Plaintiff fairly and adequately represents the interests of the shareholders similarly situated or the corporation. Hence, a shareholder seeking to bring a derivative suit in order to pursue a personal vendetta or private claim should not be granted leave. In the American case of *Recchion v Kirby* 637 F. Supp. 1309 (W.D.



Pa. 1986), for example, the Court declined to let a derivative lawsuit proceed where there was evidence that it was brought for use as leverage in plaintiff's personal lawsuit;

- d. Whether the Plaintiff is acting in good faith;
- e. Whether the action taken by the Plaintiff is consistent with one a faithful director acting in adherence to the duty to promote the success of the company would take;
- f. The extent to which the action complained against – if the complaint is one of lack of authority by the shareholders or the company – is likely to be authorized or ratified by the company in the future; and
- g. Whether the cause of action contemplated is one that the Plaintiff could bring as a direct as opposed to a derivative action.

30. It was submitted that the Plaintiff failed to place her case on the four corners of the above mentioned case hence cannot succeed to be granted leave to institute or continue a derivative suit. It was contended that considering the seriousness of the alleged wrong doing, it is clear that litigation will disrupt the company business and cause unnecessary panic amongst the public and parents.

31. It was contended that the best interest of the company should be of the highest concern when Sections 143 & 144 of the Act are read in context as both sections advocate for the director to act in a way to promote the success of the company for the benefit of its members reliance was placed in the case of Ghelani Metals Limited & 3 others vs Elesh Ghelani Netwarlal & Another (2017)e KLR, opining that the present case is not brought in the interest of the company hence there should be a compulsory refusal of permission as the same is not in the interest and benefit to the company.

32. On the second issue of Whether the Plaintiff is entitled to interim reliefs prayed for in the application, reliance was made to Order 40 Rule 1 of the Civil Procedure Rules which states:

where in any suit it is proved by affidavit or otherwise—

(a)	that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or
(b)	that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit,

the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.



33. They averred that conditions for the grant of injunction are well settled in as set out in in *Giella v Cassman Brown and co. ltd 1973*, that on prima facie case no evidence was placed before court to show the allegations of mismanagement, waste and loss of assets, negligence or abuse of trust. That a tribunal properly directing itself will not conclude that there exist a right that has been infringed.
34. They contended that an injunction is a discretionary remedy and relied on *Kenleb Cos Ltd v New Gatitu Services Station Ltd & Another*
- “to succeed in an application for injunction an applicant must not only make a full and frank disclosure of all relevant facts to the just determination of the application, but must also show he has a right, legal or equitable, which requires protection by injunction”
35. As regards irreparable harm they relied on *Halsbury’s laws of England, 3rd Edition Volume 20 Paragraph 739* . they prayed the Applicant’s application be dismissed with cost to the Respondents.

Analysis/determination

36. The court considered pleadings and submissions by parties and the issue(s) that emerge for determination at this stage is whether, there a proper suit or claim by the Applicant against the Defendants and Company and/or if the Applicant has a cause of action against the Defendants as minority shareholder in the Company or if the Applicant has a claim to sue the Defendants on behalf of the Company.

Derivative Suit

37. Section 238 of the [*Companies Act* 2015](#);

238.

- (1) In this Part, "derivative claim" means proceedings by a member of a company—
 - (a) in respect of a cause of action vested in the company; and
 - (b) seeking relief on behalf of the company.
- (2) A derivative claim may be brought only—
 - (a) under this Part; or in accordance with an order of the Court in proceedings for protection of members against unfair prejudice brought under this Act.
- (3) A derivative claim under this Part may be brought only in respect of a cause of action arising from an actual or proposed act or omission involving negligence, default, breach of duty or breach of trust by a director of the company.



Section 239. Application for permission to continue derivative claim

- (1) In order to continue a derivative claim brought under this Part by a member, the member has to apply to the Court for permission to continue it.

Section 780 of the *Companies Act* provides; -

Application to Court by company member for order under section 796

- (1) A member of a company may apply to the Court by application for an order under section 782 on the ground—
 - (a) that the company's affairs are being or have been conducted in a manner that is oppressive or is unfairly prejudicial to the interests of members generally or of some part of its members (including the applicant); or
 - (b) that an actual or proposed act or omission of the company (including an act or omission on its behalf) is or would be oppressive or so prejudicial.
- (2) In this section, "member", in relation to a company, includes a person who is not a member of the company but is a person to whom shares of the company—
 - (a) have been transferred; or
 - (b) have been transmitted by operation of law.

The ruling dated 9th June 2017, the Court in HCCC No. 102 of 2017 Ghelani Metals & Others vs Elesh Ghelani Natwarlal & Another on 9th June 2017, the Trial Court Hon L Onguto J found:

“The 4th Plaintiff is certainly within her rights to complain that the Defendant is acting oppressively. It may be stated that the Defendant's acts are unfairly prejudicial to the members of GML, GEL and TFL, including the 4th Plaintiff who legitimately expects to be treated better. She would be entitled to seek relief and also intervene on behalf of GEL where she is a shareholder and which in turn is a member of GML. (emphasis mine). The 4th Plaintiff has a remedy under statute, in my view, in the circumstances of this case.”

38. The Plaintiff's claim is that she contributed Kshs 600,000/- on diverse dates in 2020 and 2021 to boost the cash flow and working capital of the Affected Party, Waridi Utawala School Limited Company and the Defendants never acknowledged or disclosed monetary contribution.
39. The Plaintiff further complained of payment of Kshs 91,870 and Kshs 161,666 as dividends; payment of Kshs 30,000 per month as monthly salary and refund of Ksh 600,000/-



40. The Plaintiff's claim amounts to minority shareholder dispute if proved would amount to dilution of shareholding, side-lining or removal from the Board or representation by hostile majority shareholders. The plaintiff/Applicant sought refuge in the Articles of association of the Company and provisions of the *Companies Act* Sections 780-782 of the Act as outlined above.

The Respondents deposed claims of the Plaintiff's under capitalization in the Company, misconduct and unprofessionalism and sought the Application be dismissed with Costs. The Respondents asserted that they were in an ongoing enterprise of a School before the Plaintiff joined in and they had already established enterprise.

41. To determine each party's rights in the Company, the Court requires viva voce evidence /inter partes hearing for each party to prove its claim. To do so the subject-matter must be preserved especially because the Waridi Utawala School Company Limited is a separate legal entity from the individual directors of the Company.

Injunction

31. In *Giella vs. Cassman Brown & Co. Ltd* [1973] EA at Page. 358 whose holding is as follows:-

“The condition for the grant of an interlocutory injunction are now, I think well settled in East Africa.

First, an applicant must show a prima facie case with a probability of success.

Secondly, an interlocutory injunction will be normally granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages.

Thirdly, if the court is in doubt, it will decide an application on the balance of convenience”. See *Mustafa JA in Abdul Salim and Others v Okong'o and Others Civil Appeal No 44 of 1975* (unreported).

32. In *Mureithi vs. City Council of Nairobi* [1976-1985] EA 331 Madan JJA referred to *L. Diplock in American Cyanamid Co. vs. Ethicon Ltd* [1975] 1All ER 504 as follows;

“The object of Interlocutory injunction is to protect the plaintiff against injury by violation of his right of which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favor at the trial...if damages in the measure recoverable at common law would be adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiff's claim appeared to be at that stage.”

33. As to what constitutes a prima facie case, the Court of Appeal in the case of *Mrao Ltd vs. First American Bank of Kenya Ltd & 2 Others* [2003] KLR 125(Mrao case), held as follows:

“In civil cases a prima facie case is a case 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 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.”

34. The Court finds that the Plaintiff/Applicant at this stage has established a prima facie case a possible violation of right and if not protected would suffer irreparable damage and/or loss.



35. To preserve the status quo and at the same time ensure the Company continues to operate as a going concern the Court Grants the following orders;
1. An interim /temporary injunction is granted restraining any party varying, interfering, transferring and effecting changes to the share capital structure, membership or directorship of the company; varying, reducing, diluting, interfering or dealing with the Plaintiff's shareholding in the Affected Party Company; Waridi Utawala School Limited Company; and/or removal of the Plaintiff/Applicant/Director pending hearing and determination of the application/suit interpartes.
 2. The Parties/Counsel to pursue either Court annexed mediation or Case Management before DR MHC within 30 days.

It is so ordered.

DELIVERED, SIGNED & DATED IN OPEN COURT IN MACHAKOS ON 2ND DAY OF MARCH 2023 (VIRTUAL /PHYSICAL CONFERENCE).

M.W.MUIGAI

JUDGE

