



REPUBLIC OF KENYA



**Issa v Omar & 2 others (Commercial Case E149 of 2023)
[2023] KEHC 17601 (KLR) (Commercial and Tax) (23 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 17601 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E149 OF 2023
DAS MAJANJA, J
MAY 23, 2023**

BETWEEN

AHMED JAMA ISSA PLAINTIFF

AND

BILAL OMAR 1ST DEFENDANT

ABDULLAHI ABASS MAALIM 2ND DEFENDANT

PERSEA INVESTMENT LIMITED 3RD DEFENDANT

RULING

1. The Plaintiff, 1st Defendant and 2nd Defendant are shareholders of the 3rd Defendant (“the Company”). The Plaintiff holds 10% of shares in the Company while the 1st and 2nd Defendants hold 40% and 50% shares respectively. The 1st and 2nd Defendants are the directors of the Company.
2. The Plaintiff’s case as set out in the Plaint dated 8th April 2023 is that despite making substantial financial investment in the Company, he is not privy to the transactions involving the Company’s bank accounts and despite requesting for information from the directors and requesting to be added as a signatory to the Company’s bank accounts, the 1st and 2nd Defendants have refused to accede to his requests while it was agreed at the inception of the Company that he would be a signatory to the accounts.
3. The Plaintiff states that he is apprehensive that the 1st and 2nd Defendants are using the Company accounts fraudulently and that any withdrawals from the Company accounts without his consent may be put to improper use to his detriment. He avers that it is in his interest to be added as a signatory to the Company’s bank accounts in order to protect his investment.



4. The Plaintiff seeks several reliefs in the Plaintiff including a mareva injunction to freeze two Company accounts domiciled at Standard Chartered Bank, an order compelling the 1st and 2nd Defendants to provide him with financial statements, audited statements and a summary of withdrawals from the Company bank accounts from date of inception until the date of judgment and an order that he be made signatory to the two Company accounts and any other accounts that the Company may have at other banks.
5. Together with the Plaintiff, the Plaintiff filed the application dated 8th April 2023 seeking similar orders as those sought in the Plaintiff. The application is supported by his own affidavit and further affidavit sworn on 6th April 2023 and 16th May 2023 respectively. It is opposed by the Defendant through the replying affidavit sworn by the 1st Defendant on behalf of the Company.
6. In the application, the Plaintiff reiterated his averments in the Plaintiff. Notably, he produced an agreement dated 22nd June 2022 between the Company and Saharansky Company Limited (“Saharansky”) being an Avocado Machinery Purchase Agreement (“the Agreement”). Under the Agreement, it was admitted that the Plaintiff had injected significant capital into the Company and it was agreed that despite the shareholding, the profit and loss of the Company would be apportioned in the ratio 70:30 as between the Plaintiff on one hand and the 1st and 2nd Defendants on the other. Saharansky, which was the company purchasing the avocado machine, is incorporated with a third party, JMI holding 60% shares while the Plaintiff and 2nd Defendant hold 30% and 10% shares respectively.
7. The Plaintiff also produced statements of account showing that he had made substantial deposits in the Company bank accounts. He deponed that when he attempted to get information from the bank, he was directed to seek a court order. He is concerned about the withdrawal of money from the Company accounts as it is intended for a specific purpose and if the withdrawals are unchecked, they would affect the Company operations. He therefore prays that the orders sought be granted.
8. The Defendants deny the Plaintiff’s assertions. While they accept that the Plaintiff is a shareholder, they deny that there was any agreement to make him a director. Nevertheless, on 13th January 2023, they passed a resolution to appoint him as signatory to the Company accounts at the Standard Chartered Bank. As such, they reject the Plaintiff’s contention that he cannot access the Company accounts. They also point out the statements of account produced by the Plaintiff are false.
9. I heard brief submissions from the parties’ advocates and on the substance, the parties agree on the principles applicable in resolving this application are those established in *Giella v Cassman Brown* [1973] EA 358. In his application, the Plaintiff has invoked Order 40 Rule 1 of the [Civil Procedure Rules](#) which deals with interlocutory injunctions. I would however point out that the Plaintiff specifically prays for a mareva injunction pending the hearing and determination of the suit.
10. A *mareva injunction* is defined in [Halsbury Laws of England](#) (3rd Ed. Vol. 3[1]) at Page 329 as follows:

A Mareva injunction is an order of the court restraining a party to proceedings from removing from the jurisdiction of the court, or otherwise dealing with assets, located within that jurisdiction and in more limited circumstances from dealing with assets located outside, the jurisdiction. The foundation of the court’s jurisdiction is the need to prevent judgements of the court from being rendered ineffective, whether by the removal of the defendants assets from the jurisdiction, or by dissipation.
11. The Court of Appeal in [Mcdouglas Kagwa v Weekly Review Limited](#) NRB CA Civil Appeal No. 39 of 1989 [1992] eKLR accepted that the *mareva injunction* was a remedy available in Kenya and cited



with approval the following dictum of Lord Denning MR is *Owners of Cargo Lately Laden on Board the Vessel Siskina and Others v Distos Compania Naviera SA* [1977] 3 All ER 803, 809:

During the last two years the Courts of this Country have rediscovered a very useful procedure which used to be known as foreign attachment. It is now called the ‘mareva injunction’. It is a procedure by which the Courts can come to the aid of a creditor when the debtor has absconded or is overseas, but has assets in this Country. The Courts are ready now to issue an injunction so as to prevent the debtor from disposing of those assets or removing them from this Country, thus defeating the creditor of his claims. It is a procedure familiar to all the countries of the Continent of Europe and to the United States of America, and to the province of Quebec. If you read the facts in *Mareva Compania Niera SA v International Bulcarriers Ltd* [1975] 2 Lloyd’s Rep 509, you will see how desirable and important it is that the Courts should have jurisdiction to issue such an injunction. It was challenged before us recently in *Rasu Maritima SA v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara (Pertamina) and Government of Indonesia (as interveners)* [1977] 3 ALL ER 324, but the challenge failed. The procedure is now established beyond question. It has been used repeatedly in the Commercial Court to the satisfaction of all concerned.

12. Order 39 of the [Civil Procedure Rules](#) deals with the attachment before judgment which is the substance of a mareva injunction and which is essentially what the Plaintiff seeks in this case. In *Kuria Kanyoko t/a Amigos Bar and Restaurant v Francis Kinuthia Nderu, Helen Njeru Nderu and Andrew Kinuthia Nderu* [1982-88] KAR 1287, the Court of Appeal observed that, “The power to attach before judgement must not be exercised lightly and only upon clear proof of the mischief aimed at by order 38, Rule 5, namely that the Defendant was about to dispose of his property or to remove it from the jurisdiction with intent to obstruct or delay any decree that may be passed against him.”
13. Considering the facts I have outlined above, I do not think that the Plaintiff has provided any evidence to show that the Defendants are about to dissipate the Company’s assets to his detriment or have acted in any manner that demonstrates intent to obstruct or delay any decree that may be passed against them. The Plaintiff has failed to meet the high threshold for the grant of a *Mareva injunction*.
14. The gravamen of the Plaintiff’s case is that he wishes to occupy the position of a director of the Company. The election of the directors is a prerogative of the shareholders under the Company’s Articles of Association and the [Companies Act, 2015](#). Thus it is within their power to make the Plaintiff either a director or a signatory of the Company’s account. The Plaintiff has not pointed to any authority, legal or otherwise, that would allow the court to override the authority of shareholders and management to do what is within the management of the company. The principle established in *Foss v Harbottle* [1843] 2 Hare 261 that the court will not interfere with the internal management of companies acting within their powers and will only intervene if the acts complained of are *ultra vires*, of fraudulent character or cannot be rectified by ordinary resolution is still good law and applies to the circumstances of this case.
15. There is also evidence that the Plaintiff and the Defendants have entered into the Agreement which provides a profit sharing arrangement between the Plaintiff, 1st and 2nd Defendants in respect of the Company. It therefore appears that in exchange for his substantial investment in the Company, the Plaintiff’s right is to 70% of the Company’s profits and not to his involvement in management of the Company.
16. For the reasons I have set out, I dismiss the application dated 8th April 2023 with costs to the Defendants.



DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF MAY 2023.

D. S. MAJANJA

JUDGE

Court of Assistant: Mr M. Onyango

Mr Mohammed instructed by Doli and Associates Advocates for the Plaintiff.

Mr Yusuf instructed by Abdisheikh Yussuf Advocates for the Defendants.

