



Wachira & 2 others v Wanjohi & another; I & M Bank Limited (Interested Party) (Civil Suit 004 of 2023) [2023] KEHC 18847 (KLR) (Commercial and Tax) (23 June 2023) (Ruling)

Neutral citation: [2023] KEHC 18847 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT 004 OF 2023
FG MUGAMBI, J
JUNE 23, 2023**

BETWEEN

**JOSEPH MUGWERU WACHIRA 1ST PLAINTIFF
EDWARD ALANDO OMWANDA 2ND PLAINTIFF
TWENTY-TWENTY ENTERTAINMENT LIMITED 3RD PLAINTIFF**

AND

**MOSES WACHIRA WANJOHI 1ST DEFENDANT
BIRONGA THUO 2ND DEFENDANT**

AND

I & M BANK LIMITED INTERESTED PARTY

RULING

Brief Facts

1. Before the court is an application dated January 30, 2023 under Article 40(1), 48, 50 and 159 of the [Constitution of Kenya, 2010](#); Sections 8, 29 and 30 of the [Limited Liability Partnership Act](#); Section 44 of the Partnership Act; Sections 1A, 1B, and 3A, of [Civil Procedure Act](#); Order 1 Rule 2; Order 40 Rule 2; & Order 51 of the [Civil Procedure Rules, 2010](#)
2. The application seeks the following orders;
 - i. Spent
 - ii. Spent



- iii. That the Respondents whether by themselves, agents, servants, or otherwise howsoever be restrained from accessing the Bank Accounts of Topsy Corner LLP pending the hearing and determination of this suit.
 - iv. That in the alternative to prayer (c) & (d), this Court be pleased to issue an order directing that the 1st and 2nd Applicants be added as signatories to all bank accounts belonging to Topsy Corner LLP and further order mandate of at least three (3) signatories to sign for any transactions undertaken pending the hearing and determination of this suit. THAT this Honorable Court be pleased to issue an order directing that Topsy Corner LLP holds its Annual General Meeting within Fourteen (14) days from the date of this order and direct that the respondents present the Profit and Loss Account, Balance Sheet, and all relevant information on the assets and operations of the LLP as to establish the true status of affairs of the LLP and such status be reported to this Honorable Court.
 - v. That an Independent Financial Auditor be appointed to carry out a valuation and Audit all the Accounts of Topsy Corner LLP and such report be presented before this Honorable Court.
 - vi. That the LLP's Accountant and /or the accountants who handle matters concerning Topsy Corner LLP whether by themselves, agents, servants or otherwise howsoever present all statements of accounts before this Honorable Court. That this Honorable Court directs the parties to appoint an independent manager who shall oversee the affairs of the LLP's business and report to the parties herein pending the Hearing and Determination of this suit.
 - vii. That in any event, the costs of this application be awarded to the Applicant
3. The application is premised on the grounds on the face of it and supported by the affidavit sworn by Joseph Mugweru Wachira on January 30, 2023 and submissions dated March 28, 2023. The defendants opposed the application through a replying affidavit dated March 14, 2023 sworn by Moses Wachira Wanjohi and further buttressed through their written submissions.
 4. The dispute is premised on the shareholding by the applicants and respondents as partners of Topsy Corner Limited Liability Partnership (LLP) which was registered on 10th January, 2019. The 1st and 2nd respondents were appointed as the managers of the LLP. Similarly, the parties also agreed to appoint and nominate I&M bank as their depository for the business. The parties opened an entertainment business at Kiambu road on all that property known as Land Reference Number 27/272 under the name The Vineyard.
 5. A dispute ensued when the applicants discovered that the respondents were allegedly running the LLP in secrecy. The applicants' case is that they were denied access to the financial information and management report of the LLP. The applicants were also unable to access the bank statements. It also became apparent that the applicants had opened another account using the LLP's name. The 1st respondent is said to have registered and started to operate a car wash business within the property of the partnership.
 6. The applicants aver that these actions have led to the mismanagement of the LLP. Parties met with the aim of getting a way out of the situation and several resolutions were reached. The applicants signed the said minutes and bank resolutions but the respondents declined to sign the same. The applicants aver that this has seen the continuous waste and mismanagement of corporate assets and finances.
 7. The respondents in response to the application confirm the existence of the partnership. It is also not controverted that the partnership runs the business in Kiambu road and that they are the appointed managers of the LLP. The respondents however aver that they have injected more capital into the



partnership making them majority shareholders. They also aver that the 3rd respondent is not a shareholder of the partnership, having not contributed towards capital of the partnership.

8. The respondents accuse the applicants of signing off bills incurred at the business on behalf of their friends. For this reason, the respondents aver that it would be unacceptable to allow the applicants to run the company or the accounts. The respondents further accuse the applicants of being dishonest and of refusing to contribute towards renewal of the business located at Kiambu Road.
9. The respondents claim that they have had to ensure the liquidity of the business without the assistance of the applicants. The respondents deny the averment by the applicants that the car wash is run within the business premises. The respondents have also stated that they are desirous of having the partnership dissolved in the end.

Analysis

10. I have considered the pleadings and the rival submissions by counsel. The main issue for determination is whether the prayers ought to be granted. The partnership is uncontroverted and so is the business that is owned by the partnership. The prayers sought are in the form of injunctive relief.
11. Looking at the minutes of the meetings and resolutions by the partners it is obvious that the relationship between partners has broken down and there is no more trust between them. It may appear that the only way forward is for the parties to sit down, take accounts and decide what is due to the other and go their separate ways. This would appear to be the basis for the present application. The law on granting of interlocutory injunctions is set out under Order 40(1) (a) and (b) of the Civil Procedure Rules 2010.
12. The conditions for the grant of a temporary injunction were laid out in the celebrated case of *Giella vs Cassman Brown & Co Ltd* (1973) EA 385, at page 360 where Spry J held that

' The conditions for the grant of an interlocutory injunction are well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be 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.'
13. Going by this accepted threshold, the first question would be whether the applicants have shown that they have a prima facie case with a probability of success. In [*Mrao Ltd vs First American Bank of Kenya Ltd & 2 Others \[2003\] KLR 125*](#), Bosire, JA defined a prima facie case as follows:

QUOTE
14. 'I would say that in civil cases it 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 as 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. The evidence must show an infringement of a right, and the probability of the applicant's case upon trial. That is clearly a standard which is higher than an arguable case.'
15. I proceed on the understanding that in an interlocutory application, the court is not required to make any conclusive or definitive findings of fact or law, most certainly not on the basis of contradictory affidavit evidence or disputed propositions of law. Without getting into the substance of the dispute,



just by looking at the evidence produced before the court, it is obvious that there are problems between the partners over the running and management of the LLP.

16. The ownership, transactions and management of vineyard carwash have been questioned, the running and management of the business and accounts of the LLP are also in doubt, the sanctioned audit does not seem to have borne fruit. I am convinced that the applicants have shown that they have a prima facie case with a probability of success because of the various contestations that arise.
17. With respect to the second condition that the applicant must prove that he stands to suffer irreparable loss unless the injunction sought is granted, the applicants aver that they are bound to be exposed to immense loss in the event the respondents continue to make unilateral decisions without involving them. Such loss the applicants aver, may not be known since the business continues to make continuous income whose value may not be ascertainable.
18. Finally, I am convinced and I find that there would be a much larger risk of injustice if the court found in favour of the respondents, than if it determined this application in favour of the applicants so as to place the parties before the Court on equal footing. I find merit in the prohibitory/restraining orders sought. Even as the Court is called upon to preserve the subject matter herein, it is important to have the business entity continue to carry on its business, also as a way of ensuring that the subject matter is maintained. For these reasons I grant the following orders:

Determination and orders:

- i. With respect to access to the bank accounts, the 1st and 2nd applicants shall be added as signatories to all bank accounts belonging to Topsy Corner LLP.
- ii. At least three (3) signatories shall sign for any transactions undertaken in the bank accounts belonging to Topsy Corner LLP pending the hearing and determination of this suit.
- iii. The respondents and/or the LLPs accountants shall file and serve on the applicants, a statement of accounts from January 2019 to date, detailing the assets and operations of the LLP within fifteen (15) days from the date hereof.
- iv. The partnership shall hold its Annual General Meeting within thirty (30) days from the date of this order and shall; -
 - a. Agree and appoint an independent auditor to carry out an audit of all the accounts of Topsy Corner LLP from January 2019 to date, at the Firm's expense, and such report be filed before this Honorable Court.
 - b. Appoint an independent manager at the Firm's expense, who shall oversee the affairs of the LLP's business and report to the parties herein pending the hearing and determination of this suit.
- v. The applicants shall have the costs of this application.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 23rd DAY OF JUNE 2023.

F. MUGAMBI

JUDGE

Court Assistant: Ms. Lucy Wandiri.

