



**Dubai Gems Limited v Tatu City Limited & another (Civil Case E308 of 2023)
[2023] KEHC 22030 (KLR) (Commercial and Tax) (4 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22030 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE E308 OF 2023
JWW MONG'ARE, J
SEPTEMBER 4, 2023**

BETWEEN

DUBAI GEMS LIMITED APPLICANT

AND

TATU CITY LIMITED 1ST DEFENDANT

CEDAR IV LIMITED 2ND DEFENDANT

RULING

1. Before me are two applications. The first one filed on June 6, 2023 is filed by the plaintiff while the defendants, in responding to the plaintiff's application filed an application dated July 17, 2023. Because the applications relate to the same subject matter and were both canvassed contemporaneously, the ruling herein relates to the two applications.
2. By its notice of motion dated June 6, 2023 the plaintiff seeks the following orders:-
 - a. Spent
 - b. Spent
 - c. That pending the hearing and determination of this suit, this honourable court be pleased to grant the plaintiff a temporary injunction restraining the defendants whether by themselves, their agents, assigns, successors or otherwise howsoever from marketing, offering for sale/ lease, selling, leasing, transferring, entering into any contracts/agreements or arrangements for the transfer, sale, lease or alienation of, in any manner whatsoever dealing with, the property known as land reference number 28867, situate within Ruiru Municipality, Thika.



- d. That the plaintiffs do provide the plaintiff with an accurate and comprehensive statement of accounts respecting all sales, transfers, leases and commercial dealings touching on land reference number 28867, from March 5, 2010 to-date (being the period of enquiry) more specifically;
 - i. All sales, transfers, leases and disposition of shares, real estate and any asset of the defendants.
 - ii. All rental income, including accrued interest, received by or on behalf of the defendants/respondents from dealings on land reference number 28867, during the period of enquiry.
 - iii. The nature, rationale and legal justification of any disbursements, payments and debits (if any) from the funds realized from any and all dealings touching on land reference number 28867.
 - iv. The value of 4% shares due to the plaintiff as at the time of the allocation of his shareholding on March 4, 2010.
 - v. The nature, rationale and legal justification of any decisions (including issuance of any further or additional shares) affecting the shareholding of the defendant companies.
 - vi. The exact amount of money due to the plaintiff from the sales, transfers, leases and dealings on land reference number 28867.
 - vii. All interest accrued on the monies due to the plaintiff from the time of the receipt of the funds to the date of enquiry; and
 - viii. Any other matters necessary for the provision of a proper, accurate and scientific account as required under section 628 of the *Companies Act*.
 - e. That the defendants do pay to the plaintiff all monies lawfully due to it within seven (7) days from days of the order of the court.
 - f. That a finding be made that the Directors and management of the defendant companies have deliberately contravened the provisions of the *Companies Act*, have acted fraudulently and dishonestly in the conduct of their affairs to the detriment of the plaintiff and are liable to the sanctions provide under both the *Penal Code* and the *Companies, 2015*, and a recommendation for their prosecution be issued to the Office of the Director of Public Prosecutions.
 - g. That such further or other orders as are appropriate for the effective administration of justice be issued.
 - h. That costs of this application be met by the defendants.
3. The application is supported by the grounds set on its face and the supporting affidavit of Elijah Njore Njoroge sworn on June 6, 2022. The applicant has further to these proceedings filed written submissions in support of the same and a case digest both dated July 25, 2023.
 4. Upon being served with the pleadings and the orders of this court issued on June 13, 2023 the Defendants filed their respective defences and a notice of motion dated July 17, 2023 under certificate of urgency seeking the following orders:-
 - a. Spent



- b. Pending the hearing and determination of the application inter-partes, the honourable court be pleased to set aside and/or vacate in its entirety the order it issued on July 13, 2023 ex debito justitiae.
 - c. Pending the hearing and determination of the application inter-partes, the honourable court be pleased to revert to the *status quo* ante prior to the issuance of the order dated July 13, 2023.
 - d. Upon hearing and determination of this application, this honourable court be pleased to vacate, discharge and set aside in its entirety the order issued and/ or dated July 13, 2023.
 - e. This honourable court be pleased to vacate the inhibitions imposed on the defendants by the order of July 13, 2023 and allow the 1st defendant/applicant to deal with its properties land reference number 28867 situate in Ruiru, Kiambu as it deems fit and appropriate.
 - f. The cost of this application be borne by the plaintiff/respondent.
5. The defendants application is supported by the grounds set on its face and the affidavit of Mr Preston Marshall Mendedhall sworn on July 17, 2023 and annexed to the application. The defendants have similarly filed written submissions and a list and bundle of authorities dated July 21, 2023.
 6. I have carefully considered both Applications filed by the Plaintiff and the Defendants. I note that the Application of June 6, 2023 is brought under sections 628, 780,782 and 1004 of the [Companies Act](#), sections 1A,1B, 3,3A, and 63 of the [Civil Procedure Act](#) and Order 40 Rules 1, 2, 3(1) & (3) and 4(1) of the [Civil Procedure Rules](#).
 7. As can be discerned from the pleadings and the submissions thereto, the plaintiff has moved to court for a determination as to whether he is a member of the defendants companies. The plaintiff is a limited liability company with one shareholder, Elijah Njore Njorge and was incorporated in 2021. The plaintiff alleges that its claim to membership as a shareholder stems from a deed of transfer from one Stephen Mbugua Mwangi to the plaintiff pursuant to a power of attorney executed by one Etienne Deblar, allegedly the primary beneficiary to 4% of the management shares through subscription and shareholders agreement relating to Cedar IV Limited (the 2nd defendant) dated June 16, 2008. The plaintiff further avers the said shareholding can be inferred from the conduct of the parties as there was no formal contractual agreement evidencing the same and the said shareholding by the plaintiff was not affected by the order of winding up issued by a court in Mauritius of the company known as Manhattan Coffee Investments Holdings.
 8. Further, the plaintiff avers that its claim is not re judicata despite the numerous cases relating to the ownership and shareholding of the defendants. The plaintiff claims to have been sidelined and kept in the dark despite acquiring 4% shareholding of the defendants and is urging the court to restrain them until the plaintiff is included in the management of the affairs agreement of both the defendants especially as it relates to the sale and disposal of land reference number 28867 which is the only known asset of the defendants company. The plaintiff further urges the court to order that the defendants render accounts and disclose its entitlement to the assets and proceeds from the transactions conducted by the defendant since dated June 16, 2008.
 9. In the application filed by the defendants in response thereto, the defendants oppose the application by the plaintiff and urge the court to vacate and set aside its orders of July 13, 2023 restraining the defendants from continuing to deal with the property known land reference 28867 until its rights are determined. The defendant contends that issues surrounding the ownership and shareholding of the defendants have been litigated at length and resolved in the various matters filed in court by various actors both in Kenya and elsewhere and hence the issues in this suit are *res judicata*.



10. The defendants in urging the court to dismiss the application filed by the plaintiff argue that the plaintiff is a company registered on March 21, 2021 and while the defendants were incorporated and have been in operation since 2008 and therefore the plaintiff is not an owner of the suit premises, nor a shareholder or director of either defendant companies and has no relationship whatsoever with the defendants. The defendants have annexed to their supporting document a CR 12 from the companies registry records indicating who the shareholders and directors of the defendants are. The defendant further argue that the plaintiff is being used by one Stephen Mbugua Mwangi who has been embroiled in various legal disputes with the defendants including criminal prosecutions, relating to authenticity of documents thereto and should not be allowed by this court to interfere with the operations of the defendants. Further, in urging the court to dismiss the application by the plaintiff, the defendants state that they have obligations to a large number of parties who have purchased or leased parcels of land from the suit premises and are servicing foreign loans which if defaulted can lead to serious financial consequences negatively impacting the defendants.

Analysis and Determination:-

11. I have considered the pleadings and the submissions filed by the parties and I have identified one issue for determination, to wit; “whether the plaintiffs/applicants/applicant has met the threshold for a grant of an order of injunction”. In the locus classica case of *Giella v Cassman Brown Company limited*, (1973) EA at page 353 and as elaborated in the Court of Appeal case of *Nguruman Limited v Jan Bode Nielsen & 2 others*, (2014) eKLR, the court stated that “ In an interlocutory injunction Application, the applicant has to satisfy the triple requirements to:-

- “(a) Establish his case only at a *prima facie* level,
- (b) Demonstrate irreparable injury if a temporary injunction is not granted, and
- (c) allay any doubts as to (b) by showing that the balance of convenience is in his favour.”

12. In describing what amounts to a prima facie case would look like, Justice Bosire, in the case of *Mrao Ltd v First American Bank of Kenya Ltd & 2 others*[2003] eKLR had this to say:-

“The principles which guide the court in deciding whether or not to grant an interlocutory injunction are well settled. In *Giella v Cassman Brown* to refer to a case which shifts the evidential burden of proof, rather than as giving rise to a legal burden of proof in the manner he was considering, which was in relation to the pleadings that had been put forward in that case. I would certainly think that it would be in the appellant’s interest to adopt a genuine and arguable case standard, rather than one of a *prima facie* case, the former being, in my opinion, the lesser standard of the two.

So what is a *prima facie* case? 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.”

13. Have the applicants established a *prima facie* case? The plaintiffs claim herein is premised on the provisions of the *Companies Act, 2015*, upon which this suit is anchored. The plaintiff claims oppression as a minority shareholder of the defendants and is bringing the suit to stop the operations of the defendants in dealing with the sole asset of the defendants being land reference number 28867.



14. Section 780 of the *Companies Act, 2015*, upon which the plaintiff has brought this suit provides as follows;

- "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—
 - i. have been transferred; or
 - ii. have been transmitted by operation of law."

15. In order for the plaintiff to establish a locus upon which relief orders sought can be granted, the plaintiff is required to provide evidential material to demonstrate that they have membership in the company by being either subscription or by transfer or operation of the law. I have considered the arguments put forth by the plaintiff as to its inclusion in the defendants. The plaintiff argues that by virtue of a deed of transfer from one Stephen Mbugua Mwangi whom by virtue of a power of attorney from one Ettiene Deblar, owns a 4% shareholding of the defendants. The defendant on the other hand have provided a CR12 to demonstrate that the said Ettiene Deblar is not a shareholder of the defendants and therefore has no shares to transfer to the plaintiff or donate to any other person from the defendants.

16. In order for the court to grant the orders of injunction, the plaintiff has to satisfy that it has a prima facie case with a likelihood of success as set out in the *Giella* case cited above. Upon consideration and evaluation, the material placed before me by the plaintiff and i am not satisfied that the plaintiff has an outright claim to membership of the defendants. The route to membership is convoluted through an intricate and complex web of transactions and will require to be established with evidence that can be tested through examination of the material upon which the applicant places reliance. It is in my view that this is not something that the court can determine at an interlocutory stage and without conducting a full hearing of the case herein. I am therefore not persuaded that the plaintiff has established a *prima facie* case to warrant the grant of the said orders sought as described in the *Mrao Ltd -v- First American Bank of Kenya Ltd & 2 others*(supra). Accordingly, in light of the holding by the court of appeal in the *Nguruman Limited Vs Jan Bonde Nielsen & Others* [2014] eKLR thus:-

“It is established that all the above three conditions and stages are to be applied as separate distinct and logical hurdles which the applicant is expected to surmount sequentially...if prima facie case is not established, then irreparable injury and balance of convenience need no consideration...”

I will not consider the other two parameters necessary for a grant of injunction.



17. The second limb of this application is one where the plaintiff is seeking for accounts from the defendants. In my view, the issues surrounding provision of accounts are matters that shall require evaluation of the evidence surrounding the claim for membership before the court can determine if the plaintiff is deserving of an order for accounts. The issue of membership to the defendant being one that is not outright must be established by evidence. This will require parties to call evidence that can be tested in the normal cause of hearing the main suit and not one that can be determined at an interlocutory stage. I shall therefore at this stage make no orders in respect of the said prayers.
18. Having found that the plaintiff has not established a *prima facie* case to warrant a grant of the order of injunction, I find and hold that the application dated June 6, 2023 by the plaintiff has not merit and I hereby dismiss the same. The defendant's application of July 17, 2023 is successful. Both parties filed separate applications to these proceedings. I direct and order that each party meets its own costs to the applications.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 4TH DAY OF SEPTEMBER 2023.

J. W. W. MONG'ARE

JUDGE

