



**Awuor v Achach Estates Limited & 2 others (Commercial Case E340 of 2024)
[2024] KEHC 13646 (KLR) (Commercial and Tax) (5 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 13646 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E340 OF 2024
JWW MONG'ARE, J
NOVEMBER 5, 2024**

BETWEEN

LINDA ACHIENG ATIENO AWUOR PLAINTIFF

AND

ACHACH ESTATES LIMITED 1ST DEFENDANT

GEORGE KABAKA AWUOR ATIENO 2ND DEFENDANT

CHUMATEC LIMITED COMPANY 3RD DEFENDANT

RULING

1. What is before the court for determination is the Plaintiff's Notice of Motion application dated 18/6/2024 brought pursuant to section 238- 241, 782, 786, 1000, 1004 and part X of the [Companies Act, 2015](#), The Companies[General]Regulations, 2015, Order 51 of the Civil Procedure Rules and Section 3A of the [Civil Procedure Act](#).
2. The Plaintiff seeks for the following orders:
 - “1. Spent.
 2. Spent.
 3. That pending the hearing and determination of the suit herein:
 - i. This honourable court be pleased to issue an order restraining the 1st, 2nd and 3rd Respondents from requisitioning, organising, convening any meeting of the 1st Respondent Company, including any Extraordinary General Meeting.



- ii. The 1st Respondent by themselves, agents, servants, or otherwise howsoever, be restrained from taking and making decisions, giving instructions, writing and signing letters, notices, forms, deeds, minutes, resolutions, returns and any other documents in the name of and/or on behalf of the 1st Respondent without the consent and concurrence of the Applicant.
 - iii. This honourable Court be pleased to issue an order prohibiting the 2nd Respondent, their agents, proxies, nominees, employees, servants, relatives, workers from transferring, withdrawing and/or utilising the funds in the 1st Respondent's and 3rd Respondents 'Accounts.
 - iv. This honourable court be pleased to issue an order compelling the 1st and 3rd Respondents Accounts to be operated by all the shareholders of the Respondent Companies.
 - v. This Honourable Court does order that, upon terms of references being set out by the Honourable Court, the Respondents be compelled to render the books of account of the 1st Respondent and 3rd Respondent.
 - vi. In the alternative, an audit firm be agreed upon by the parties and be selected from the prominent audit firms in the country and be appointed to undertake a forensic audit of all facets of the 1st Respondent's financial state from the date of its incorporation on the 27th July 2022 to the current month and to report and file its findings in court within 60 days from the date the Honourable Court makes the order. And further that if such an audit firm is not agreed upon by the parties, the court to appoint an audit firm to carry a forensic audit of the 1st Respondent Company for the period stated and file the same with the court.
 - vii. This Honourable Court be pleased to issue a temporary injunction prohibiting, stopping and restraining the 1st Respondent from selling, transferring, charging, mortgaging, pledging, exchanging and/or disposing off and dealing in any way whatsoever the shares she holds, subscribes to and owns in the 1st Respondent company.
 - viii. This Honourable court be pleased to issue a temporary injunction stopping, restraining and prohibiting the 2nd and 3rd Respondents from paying themselves, receiving, drawing any monies whether be it dividends, loans, allowances, rent collected, advances or any other monies from the 1st Respondent company.
4. That this Honourable Court be pleased to give such further orders and or directions that it deems fit, necessary, equitable, fair and just in light of the circumstances of the case.



5. That the fees and legal costs incurred by the Applicant herein in filing, prosecuting, handling and continuing with the suit herein be authorised by the Honourable Court to be charged to, be indemnified by and paid by the Respondents.”
3. The application is premised on the grounds set out in its face and the affidavit sworn by the Plaintiff, Linda Achieng Atieno Owour, on 18/6/2024. In the said supporting affidavit, the Plaintiff averred that she is a shareholder and director of the 1st Defendant company and that she filed the instant application to protect the company against unfair prejudice.
4. Further she has alleged that the 2nd Respondent operates the business of the 1st and 3rd Respondents without disclosing the whereabouts of the bank accounts where all monies received from the vast estate are deposited and therefore she is apprehensive that there is some under hand dealings within the 1st and 3rd Respondents that may lead to unfair prejudice.
5. The Plaintiff further argues that only the 2nd Respondent is in actual operation of the 1st and 3rd Respondents to her detriment and that the 2nd Defendant has been negligent and committed a breach of trust in the running of the affairs of the two. It is therefore the Plaintiff’s prayer that it would be fair, just and expedient to allow the instant application.
6. In opposition to the application, The 2nd Defendant, George Kabaka Awuor Atieno, filed a Preliminary Objection (P.O) dated 25/9/2024 together with grounds of opposition dated 4/10/2024 to the present application.
7. In the said objection, the 2nd Defendant contended that the Plaintiff lacked the locus standi to continue the instant suit against him having failed to obtain leave of the court pursuant to section 239(1) of the Companies Act 2015 and that the Plaintiff wrongly invoked the jurisdiction of the court as the property forming the subject matter of this suit was still undergoing administration thus ownership has not passed to the 1st Defendant therefore issues arising from the subject property are still a preserve of the probate court.
8. Alongside the Objection the 2nd Defendant filed grounds of opposition. In the grounds of opposition, the 2nd Defendant reiterated the contents in the Objection and stated further that the orders that the Plaintiff is seeking in the interim were the same as those in the main suit and if granted, the same were capable of disposing of the entire suit at the interlocutory stage before hearing the parties on the substantive issues.
9. The Plaintiff filed a response to the Preliminary Objection raised by the 2nd Defendant vide a replying affidavit sworn on 14/10/2024 by herself.
10. The Plaintiff contended that she possesses the requisite locus standi as she is a shareholder in both the 1st and 3rd Defendants and a beneficiary in the succession cause alluded to by the Defendant, a position that confers upon her the right to institute this suit.
11. The Plaintiff further averred that she was acting in the best interest of the company, seeking to rectify gross breaches of a fiduciary duty and negligence by the 2nd Defendant.
12. Further that the suit primarily concerns the 2nd Defendant’s mismanagement and breach of fiduciary duties with respect to the company’s assets not the transfer of the estate property therefore this court has the jurisdiction to deal with the substantive issues pleaded. She urged the court to allow the application and grant the orders sought therein.



Analysis and Determination:

13. At the time of writing this ruling, the 2nd Defendant had filed written submissions dated 11/10/2024 while the Plaintiff's submissions were not on record.
14. Having considered the pleadings and the written submissions filed by the 2nd Defendant in this matter, I am satisfied that the first issue for determination is whether this court has the jurisdiction to determine the subject matter.
15. The record indicates that there is a succession cause, that is Succession Cause No. E008 of 2021 In The Matter Of The Estate Of Nelson Atieno Owuor [deceased]. In the succession cause, a grant of representation to the estate of the deceased was granted to Rose Adhiambo Owuor and the assets of the deceased were to be distributed amongst his beneficiaries including the Plaintiff and 2nd Defendant. The confirmed grant issued on 16/11/2023 stated that the properties of the deceased were to be transferred to the 1st Defendant company where all the beneficiaries would be listed as directors and equal shareholders. The confirmed grant is produced as 'LAA01' in the Plaintiff's supporting affidavit.
16. The aforementioned Rose Adhiambo Owuor, the administrator in the succession matter passed away on 3/5/2024 as evidenced on the death and funeral announcement annexed as 'LAA04' in the Plaintiff's supporting affidavit. I have also noted that the 2nd Defendant is in the process of applying to substitute Rose Adhiambo to enable him to transmit the estate of the deceased to the 1st Defendant as required in the confirmed grant.
17. I have considered the material filed before this court by the parties in detail and I am satisfied that there was no evidence placed before me to prove that the estate of the deceased was already transferred to the 1st Defendant company in light of the demise of the original administrator to the said estate. I therefore agree with the 2nd Defendant that the subject matter of this suit, that is the affairs of the 1st Defendant company, cannot be considered by this court yet as it is still a preserve of the succession court.
18. In *Bonface Waweru Mbiyu Vrs Mary Njeri & Another (2005) eKLR* the court stated:

“The entry point into any court proceeding is jurisdiction. If a court lacking jurisdiction to hear and determine a matter overlooks that fact and determines the matter, its decision will have no legal quality and will be a nullity. Jurisdiction is the first step in the legal authority of a court or tribunal and its absence disqualifies a court or tribunal from determining the question... wherever a matter is filed before a court lacking jurisdiction, the professional error there committed is a fundamental one, which cannot be excused as an ordinary mistake by counsel...”
19. I agree with the holding in the authority cited above. I therefore find and hold that the suit before this court should first be heard and determined by the Probate court and exhausted. The present application can be raised in the said succession proceedings if there is a need to protect the estate from wastage before distribution. It is my finding that therefore this court is not the proper forum to ventilate the issue being raised by the Plaintiff before the estate has passed to the 1st Defendant company.
20. In addition, and assuming that this court has the requisite the jurisdiction, the Plaintiff being a shareholder of the 1st Defendant company suing on its behalf due to the alleged violations by its director, was first required by the *Companies Act* to obtain the leave of court prior to instituting the suit. This suit being in the nature of a derivative claim and under section 239(1) of the *Companies Act*, a member of the company has to apply to the court first in order to continue a derivative claim and the Plaintiff did not do so.



21. All in all, it is my finding that the instant application fails and the court finds that at this stage of the proceedings the court is not clothed adequately with the requisite jurisdiction to consider this suit and lays down its tools.
22. This matter being closely related to a succession cause pending before a court of competent jurisdiction in which the parties are related, it is our considered view that the matters before this court in the present application be placed before the said court for necessary orders upon consideration. The parties are family members and therefore I find that this is a suitable case to direct that each party bear its own costs of the suit. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY at NAIROBI this 5TH DAY OF NOVEMBER 2024

J.W.W. MONG'ARE

JUDGE

In the Presence of:-

Ms. Jane Odiya for the Plaintiff/Applicant.

N/A for the Defendant/Respondents.

Amos - Court Assistant

