



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL AND TAX DIVISION

MISC. CIVIL APPLICATION NO. E1227 OF 2020

MARGARET RACHEL MBOGO 1ST APPLICANT

WALTER NYAMU KARIUKI 2ND APPLICANT

VERSUS

ROBERT NJOKA MUTHARA 1ST RESPONDENT

NEW EMBU UHURU GARAGE LIMITED 2ND RESPONDENT

RULING

1. The applicants commenced these proceedings vide a Notice of Motion dated 18/11/2020. The same was brought under **sections 1A, 1B, 3A and 63(e) of the Civil Procedure Act, Order 40 Rules 1, 2 and 3 of the Civil Procedure Rules, section 72 of the Interpretation and General Provisions Act and Article 159 of the Constitution.**

2. In the Motion, the applicants sought an injunction to restrain the respondents from dealing with the assets of the 2nd respondent and/or collecting debts due to the 2nd respondent. There was a second prayer seeking to prohibit **Africa Merchants Assurance Co. Ltd** and **Toyota Kenya Ltd** from making any payments to the respondents pending the appointment of directors of the 2nd respondent.

3. The application was supported by the affidavit of **Margaret Rachel Mbogo** sworn on 15/11/2020. She swore that she and the 2nd applicant are administrators of the estate of **Gershon John Mbogo** a director and shareholder of the 2nd respondent; that all the directors and shareholders of the 2nd respondent were deceased; that the affairs of the 2nd respondent were being conducted in an oppressive manner.

4. That while there was pending an application for the appointment of nominated directors in **Misc. Ciivil Appln. No. E820 of 2020 Margaret Rachel Mbogo & Another vs. The Registrar of Companies**, the 1st respondent fraudulently appointed himself a director and has been embezzling funds belonging to the 2nd respondent. That there were funds expected from the debtors of the 2nd respondent which would be embezzled unless the orders sought are granted. It was urged that the application be allowed.

5. The 1st respondent opposed the application vide his replying affidavit sworn on 30/12/2020. He contended that the application was fatally defective as the suit was not anchored in any law; that the applicants should have brought a derivative suit instead and that the applicants are not yet members of the 2nd respondent as the shares of their deceased parents had not yet been transmitted to them.

6. It was further contended that the 1st respondent was appointed a director of the 2nd respondent in 2001 and a signatory of its accounts in 2003. That since the shares of the deceased shareholders had not been transmitted, no lawful meetings could be held to make binding resolutions. That it would be wrong to restrain the debtors of the 2nd respondent from paying what was due to the 2nd respondent. He prayed that the application be dismissed.

7. Together with the replying affidavit, the respondents filed a Notice of Preliminary Objection dated 3/11/2020.

8. On 8/12/2020, the respondents took out a Motion on Notice dated 8/12/2020 brought under **Order 40 Rule 7 of the Civil Procedure Rules** and **sections 1A, 1B and 3A of the Civil Procedure Act**. They sought that pending the hearing of the applicant's Motion of 18/11/2020, the court does discharge the interim order made on 20/11/2020 and extended on 2/12/2020.

9. The application was supported by the 1st respondent's affidavit sworn on 8/12/2020. He contended that the 2nd applicant had sworn an affidavit on 30/11/2020 dissociating himself from the suit. That the affidavit in support of that application had deponed lies. That in the premises, the orders of 20/11/2020 were obtained illegally, fraudulently, through lies and in bad faith.

10. On 18/1/2021, the Court directed the parties to file and exchange written submissions on both applications and the preliminary objection. As at the time of writing this ruling, only the respondents had filed their submissions. I have considered the entire record and the submissions of Learned Counsel.

11. I propose to begin with the preliminary objection. In their preliminary objection dated 30/11/2020, the respondents prayed that the application dated 18/11/2020 be stuck out on three grounds. These were that; the application was incurably defective and incompetent for lack of anchorage and/or being premised in a substantive suit; that the application violates **Order 40 Rule 1 of the Civil Procedure Rules, 2010** and that in the premises, the application was defective and incompetent in form and substance, was scandalous, frivolous and vexatious.

12. It was submitted for the respondents that the application was not predicated on any suit. That the prayer for prohibition was directed at non-parties to the suit, **Africa Merchant Assurance Co. Ltd** and **Toyota Kenya Ltd**. That the prayers were in the interim and should have rested on a suit which is not there. The cases of **Francis Muiruri v. Benard Gathuku Ngugi [2007] Eklr** and **George Kyaka & 5 Others v. Harrison Chege Kariuki & 2 Others [2019] Eklr**, were relied on in support of that submission.

13. That in the premises, the temporary injunction granted ex-parte should not have been granted as it was not anchored on any substantive prayer for permanent injunction. That it should therefore be discharged.

14. I have considered the depositions and the submissions on record. The only two substantive prayers sought in the Motion dated 18/11/2020 were in the following terms: -

“2. THAT a temporary injunction do issue restraining the Respondents, whether by themselves, their advocates, Auctioneers, agents or whomsoever from dealing in by way of disposing, alienating, advertising for sale, and/or collecting debts owed to the 2nd Respondent by Africa Merchants Assurance Company Limited, Toyota Kenya Limited and/or any other Company from making any payment to the 1st Respondent pending the hearing and determination of this application.

3. THAT a prohibition order do issue directed at Africa Merchants Assurance Company Limited, Toyota Kenya Limited and/or any other Company from making any payment to the Respondents whether by themselves, their advocates, Auctioneers, agents or whomsoever pending the appointment of directors of the Company”.

15. It is clear that what the applicants were seeking were injunctive orders against the respondents. The said orders were both interim in nature. Injunctions are provided for under **Order 40(1) of the Civil Procedure Rules**. The relevant parts of that **Order** provides: -

“1. Where in any suit it is proved by affidavit or otherwise –

...”.

15. A “suit” is defined in **section 2 of the Act** as “all civil proceedings commenced in any manner prescribed”. **Section 19 of the Act** provides: -

“Every suit shall be instituted in such manner as may be prescribed”.

16. **Order 3 of the Rules** provides: -

“Every suit shall be instituted by presenting a plaint to the Court, or in such other manner as may be prescribed”.

17. The injunctive prayers are sought in favour of the 2nd respondent. In her affidavit in support of the Motion, the 1st respondent stated as follows: -

“6. THAT Company has no living director and/or shareholder to manage the affairs of the Company and sanction the execution of its obligations.

7. THAT the Company's affairs are being or have been conducted in a manner that is oppressive or is unfair to the interest of the members generally.

....

22. THAT the orders sought herein are to preserve the assets of the Company for the benefits (sic) of the beneficiaries”.

17. From the foregoing, it is quite clear that the proceedings herein were commenced for and on behalf of the Company. They should have been presented under the **Companies Act, 2015**. Under **sections 238 and 239 of the Companies Act, 2015**, actions on behalf of a company, where for one reason or the other the company cannot institute one are termed as derivative suits. Leave of Court must be sought before such

actions can be commenced or continued. In the present case, the applicants did not seek leave of Court, neither have they sought leave to continue the same.

18. In **Khadar Developers Limited v. Diamond Trust Bank Limited [2020] Eklr**, the court held: -

“This Court takes cognisance of the fact that, the constitution requires the courts under Article 159 to render justice without undue regard to procedural technicalities. However, where a party fails to comply with express provisions of the law on how to move the court, the court has no discretion by way of the oxygen principle to breathe life to a proceeding that is contra-statute. That will be illegal. Courts are there to apply and protect the law. They only tamper the application of the law with fairness and justice. Courts cannot encourage parties to act outside the law.

The procedure on how to move the court for relief is not a technical procedural issue. It is a substantive issue because, it enables the parties to present their respective cases with certainty and convenient manner. With certainty or procedure, prejudice is avoided. This is what the procedural law and rules are for”.

18. In **Francis Muiruri v. Bernard Gathuku Ngugi (supra)**, the court observed: -

“It is trite law that an interim application has to be anchored on an existing suit. In fact, all the provisions of order 39 Civil Procedure Rules (now order 40 of the Civil Procedure Rules, 2010) the main provision of law under which the application is brought talks of ‘in any suit’. In the suit we have a mandatory injunction is not pleaded and prayed for and so this relief is not properly anchored in the plaint and so it cannot be entertained”.

19. In the present case, the proceedings were commenced by way of a Motion on Notice. The Motion was not anchored in any suit. Every interim proceeding must be anchored on a substantive suit as is prescribed by law or under the rules. There is no suit here wherein the Motion could be anchored. There can be no proceeding hanging in the air. The Motion is misconceived, fatally defective and cannot stand. It is for striking out.

20. Having come to the foregoing conclusion, there is no need to consider the second Motion. Accordingly, the Motion dated 18/11/2020 is hereby struck out with costs to the respondents. Consequently, the orders made on 20/11/2020 are hereby discharged and set aside.

It is so ordered.

DATED and **DELIVERED** at Nairobi this 8th day of February, 2021.

A. MABEYA, FCIArb

JUDGE