



**Meridian Acceptances Limited v Muchungu (Commercial Civil Case E743 of 2021)
[2021] KEHC 192 (KLR) (Commercial and Tax) (3 November 2021) (Ruling)**

Neutral citation: [2021] KEHC 192 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX**

COMMERCIAL CIVIL CASE E743 OF 2021

DAS MAJANJA, J

NOVEMBER 3, 2021

BETWEEN

MERIDIAN ACCEPTANCES LIMITED PLAINTIFF

AND

JAMES NDWIGAH MUCHUNGU DEFENDANT

RULING

1. The Plaintiff has filed the Notice of Motion dated 9th August 2021 made, inter alia, under Order 41 Rule 1 of the *Civil Procedure Rules* seeking the following orders:
 - I. Spent*
 - II. Spent*
 - III. THAT pending hearing and determination of this Suit this Honourable Court be pleased to issue a Prohibitory Order restraining the Respondent, his children, his agents or people acting under his instructions from accessing the Applicant's offices and/or conducting business on behalf of the Applicant.
 - IV. Spent*
 - V. THAT pending hearing and determination of this Suit this Honorable Court be pleased to issue a Prohibitory Order restraining the Respondent, his children, his agents or people acting under his instructions from accessing the company server online.
 - VI. Spent*



- VII. THAT pending hearing and determination of this Suit this Honorable Court be pleased to issue a Mandatory Order compelling the Respondent, his children, his agents or people acting under his instructions to surrender all passwords of computers, ntsa etc
- VIII. Spent*
- IX. THAT pending hearing and determination of this suit this Honourable Court be pleased to issue a Mandatory Order compelling the Respondent, his children, his agents or people acting under his instructions to reinstate all employees fired from meridian by him and his family.
- X. Spent*
- XI. THAT pending hearing and determination of this Suit this Honourable Court be pleased to issue a Mandatory Order compelling the Respondent, his children, his agents or people acting under his instructions to surrender the company cars in his possession and/or with his children
- XII. That the Honourable Court be pleased to Order officers from Directorate of Criminal Investigation (DCI) from Nairobi central police station to escort the Director(s) of the company to the office for take over.
- XIII. Spent*
- XIV. THAT this Honourable Court be pleased to make such further orders as are necessary for the ends of justice.
- XV. THAT the Respondent be condemned to pay the Costs of this Application.

- 2. The application is supported by the affidavit of Eduardo Hernandez Ciriza, the Chairperson of the Board of Directors of the Plaintiff, sworn on 9th August 2021. It is opposed by the Defendant through his replying affidavit sworn on 31st August 2021.
- 3. It is not in dispute from the parties' pleadings that this matter concerns the affairs and running of the Plaintiff ("the Company"), which the court had an opportunity to partly determine in HC Comm Case No. E071 of 2021 and consolidated with Misc. Civil Application No. E1308 OF 2020, *Trevor Sawaya Ndwiga and 5 others v Meridian Acceptances Limited and Another; Eduardi Hernandez Ciriza and 3 Others (Intended Interested Parties) [2021] eKLR*. For ease of reference, I will ingeminate the facts that are common cause and findings of the court therein.
- 4. The Company undertakes the business of rendering financial services within Nairobi County and when it was incorporated in 2007, it had the following shareholders:



NAME	NATIONALITY	SHARES	
1	JAMES NDWIGAH MUCHUNGUH	KENYAN	398193
2	GONZALO HERNANDEZ CIRIZA	SPAIN	881915
3	PALOMA MOSQUERA CIRIZA	SPAIN	159651
4	EDUARDO HERNANDEZ CIRIZA	SPAIN	679652
5	JOAN HERNANDEZ CIRIZA	SPAIN	218089

5. Gonzalo Hernandez Ciriza died on 15th January 2018. The Defendant was appointed as the Managing Director of the Company in the year 2012 and remained in the same position until his services were apparently terminated on 2nd December 2020 following accusations of acts of negligence and breach of trust by the other directors. The Defendant also attempted to introduce his family members as shareholders of the Company on 11th December 2020, which attempt, though initially successful, was rescinded by the Registrar of Companies who reverted the Company shareholding to the original position of shareholders and directors as shown above.
6. The Defendant together with the said family members were aggrieved with the decision by the Registrar of Companies and challenged it by filing suit in HC COMM Case No. E071 OF 2021. That suit was and consolidated with Misc. Civil Application No. E1308 OF 2020 which the other directors sought to institute a derivative suit. Although the court suggested to the parties to resolve the issue of shareholding and directorship in accordance with the Articles of Association, the parties failed to do so and agreed that the court should resolve whether the persons introduced by the Defendant as shareholders of the Company on 11th December 2020 were lawful shareholders.
7. After hearing the parties' submissions therein, the court, in the judgment dated 13th August 2021 held that the transfer of shares by Defendant to the family members was proper to the extent that the Defendant was not required to give notice of the same under Article 5 of the Company's Articles of Association but that the said transfer had to be placed before the Directors for approval or otherwise in accordance with Article 9. Thus, unless and until the share transfers were approved by the directors as required by Article 9(b), the said family members could not become shareholders and directors of the Company.
8. In the same judgment, the court declined to grant the other shareholders permission to commence a derivative action on behalf of the Company against the Defendant as they held majority of the shares as opposed to the Defendant, hence they could not be termed as minority shareholders who are oppressed. In sum, the court held that under the Articles of Association, the directors have the



power to decline registration of any transfer of shares to a members' relatives and that the members of the Company also have a right to amend the Articles of Association if they so wish. On this issue, the court left it to the Companies' members to decide whether they may call for a General or Special Meeting. The court also stated that no purpose will be served by proceeding further with the suit HC COMM Case No. E071 OF 2021 as the issue in contention had been determined by an authoritative interpretation of the Articles by the court.

Plaintiff's Application

9. With the above facts and determination in mind, I now turn to determine the Company's application but before I do let me summarise the Plaintiff's claim, which forms the basis of the application for injunction, as set out in the Plaint dated 9th August 2021. It states that the Defendant was appointed Managing Director in the year 2012 and remained in the same position until his services were terminated on 10th December 2020.
10. The Company accuses the Defendant of breach of fiduciary duties and/or mandates by withholding disclosures of conflict of interest, non-compliance with statutory requirements among others without authority of the Board of Directors. It faults the Defendant of mismanaging the Company finances of the Company, firing and hiring of staff, failing to observe due diligence in his performance and thus occasioning great loss to the Company.
11. The Company charges the Defendant with usurping the powers that he does not possess and states that with aid of his family members, agents, or individuals acting under his instructions, fired Company employees, that he has taken into his possession Company property without express authority or permission of the company. It argues that this conduct continues to cause it loss and damages and urges the court to grant the injunction.
12. In order to support its claims, the Company has produced a report titled, "Internal Investigation Report on Inquiries into allegations of gross misconduct by James Ndwiga Muchungu" dated 16th December 2020 and Preliminary Special Audit Report prepared by ECM Consulting Group LLP dated 4th August 2021.

The Defendant's Response

13. The Defendant's case is that the orders sought are cannot be granted as they are final and dispositive and would effectively determine the issues raised in this suit summarily without a hearing. He submits the nature of the claims and reliefs sought in the application can only be resolved and granted in a hearing on merit but not at an interlocutory stage. He also accuses the Plaintiff's deponent of seeking to effect a management takeover of the Company by removing him as the managing director of the Company and instead thereof have other directors take over the management of the Company.
14. The Defendant contends that the present application is similar to the one made in Misc.E1308 of 2021, which was disposed of by way of the by the decision of the court made on 13th August 2021 to the effect that 'all the matters complained of can be resolved by a meeting of the shareholders.' The Defendant states that instead of following the court's directions, the Company has through the other directors embarked on a malicious expedition of maligning his name through personal accusations of a criminal nature, intimidation using threats of a forceful takeover and use of the police to harass him and gross interruption and interference with the operation of the business through the unilateral and irregular hiring of a purported Acting Managing Director and other staff without any reference or consultation with him as the Managing Director and further without any resolution to that effect by the board of directors.



15. The Defendant contends that no meeting or resolution of the Company has been held to remove him and that this suit is as a result of unilateral action and that the application merely seeks judicial sanction and approval for the director's irregular actions and decisions. The Defendant further accuses the other Company directors of instituting criminal complaints against him and his family and causing them to be charged in Nairobi Criminal Case No. E882 of 2021, Republic v James Ndwiga and Others, on the allegations that they have stolen money which they have pleaded in this matter as being owed to the Company. The Defendant accuses the Company of prevaricating on the facts available in this matter in an attempt to procure the orders sought through misrepresentation and mischaracterization of facts and numbers.
16. The Defendant depones he attended the last known directors meeting held on this court's direction on 17th March 2021 for the strict purpose of discussing the validity of the transfer of shares to his spouse and children. He states that the meeting did not discuss management related issues hence there is no factual basis upon which the court can grant the orders sought. He adds that while the Articles of Association of the Company together with the *Companies Act*, 2015, provide for the Company Secretary as the custodian of the official records of the Company, the Company has not provided any minutes or record of any other meeting as a basis of its case.
17. The Defendant disputes the contents of the Investigation Report presented by the Company's on the ground that it is biased. He states that it is not sanctioned by the directors and that he was not given an opportunity as the Managing Director to answer or respond to the allegations therein. The Defendant states that the nature of the Company's business is micro lending which often involves disbursement of loans in cash and the purported withdrawals from the bank accounts is not for use by the particular staff but for deployment to the Company's clients who are mostly small scale borrowers. Further, the said withdrawals constitute the operational expenses of the Company and only an in-depth and objective audit can demonstrate the true financial position of the Company.
18. The Defendant thus restates that this matter and the issues raised relate to the operations of the Company's business and the competing claims by the parties which can only be resolved through court annexed mediation or agreement of the parties. He thus urges this court to make appropriate directions in that regard.

Analysis and Determination

19. From the parties' pleadings, the main issue for determination is whether the court should grant the orders sought by the Company which are prohibitory and mandatory in nature. As regards the restraining injunction, the question is whether the Plaintiff has met the conditions for the grant of an injunction as set out in *Giella v Cassman Brown [1973] EA 385*. In order to succeed in obtaining an interlocutory injunction, the Plaintiff must demonstrate that she has a prima facie case with a probability of success, that she will suffer irreparable loss which cannot be compensated by an award of damages if the injunction is not granted and if the court is in doubt regarding the nature of injury, determine the matter on a balance of convenience. In *Nguruman Limited v Jane Bonde Nielsen and 2 Others NRB CA Civil Appeal No. 77 of 2012 [2014] eKLR*, the Court of Appeal reiterated those conditions and added that they are to be considered as separate, distinct and logical hurdles a plaintiff is expected to surmount sequentially. As to what constitutes a prima facie case, the Court of Appeal in *Mrao Ltd v First American Bank of Kenya Ltd MSA CA Civil Appeal No. 39 of 2002 [2003] eKLR*, stated that, "In civil cases, it is a case in which, on the material presented to the court a tribunal property 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."



20. In considering the matter, I think it is important to keep three issues in mind. The first is that although the Defendant is director of the Company by virtue of being a shareholder, his position as Managing Director is not tenured in the Articles of Association. He is an employee and serves at the behest of the Company. Second, it is not in dispute that the Defendant is a minority shareholder while the majority are represented by Chairperson of the Board of Directors. This position was affirmed by the judgment in *Trevor Sawaya Ndwiga and Others v Meridian Acceptances Limited and Others* (Supra). Third, the Defendant does not dispute the right of the Company to institute these proceedings which right is, in any case, affirmed by the decision I have cited.
21. The Defendant is accused of breach of fiduciary duties, withholding disclosures of conflict of interest, non-compliance with statutory requirements, financial mismanagement and acting without authority and approval of the Board of Directors. Whether the allegations are true or not is a matter for determination at the appropriate stage. What is clear is that the majority shareholders have lost confidence in their Managing Director who acts at the behest of the Board of Directors and Company. This position is bolstered by the judgment in HC COMM Case No. E071 OF 2021 consolidated with Misc. Civil Application No. E1308 OF 2020 (*Trevor Sawaya Ndwiga and Others v Meridian Acceptances Limited and Others*) where the court rejected the Defendant's attempt to introduce family members as shareholder's and directors.
22. The Defendant's insistence on remaining Managing Director of the Company will grind the management of the Company to a halt against the wishes of the majority shareholders. Thus, even if I accept that the process of removal of the Defendant, as Managing Director, was unprocedural, the decision may yet be ratified by the shareholders. The Defendant would in any case be entitled to damages for unfair dismissal from his position as an employee of the Company. The Company is entitled to appoint its Managing Director and the Managing Director does not have a right to remain in office particularly against the wishes of the majority shareholders and directors. In this respect therefore, I find that the Company has established a prima facie case with a probability of success.
23. Since the position of Managing Director is an employment position, unfair dismissal or removal can be remedied by an award of damages. On the other hand, the continued stalemate between the Company and the Defendant would cause the Company irreparable harm. The Defendant must now yield to the directions and dictates of the Company to relinquish that position.

Conclusion and Disposition

24. For these reasons, I find that the Plaintiff's application dated 9th August 2021 is, in substance, merited. However, some of the orders sought are unnecessary as they concern acts which the Company itself may undertake. As director of the Company, the Defendant is entitled to visit the Company's offices, attend board meetings but may not interfere with its management.
25. I agree with the Defendant that the court should exercise great circumspection in issuing an interlocutory mandatory injunction but in this case, the mandatory orders I intend to issue are consequential and necessary to ensure that the Company is not prejudiced by the Defendant's acts.
26. For the reasons I have set out above, I now make the following orders:
 - a. THAT pending hearing and determination of this suit an injunction be and is hereby issued restraining the Defendant and any persons acting under his instructions from conducting any business on behalf of the Plaintiff and accessing the company server online.



- b. THAT pending hearing and determination of this suit a mandatory injunction be and is hereby issued compelling the Defendant, agents and any persons acting under his instructions to surrender all passwords of computers, documents and company property in their possessions.
- c. THAT the Respondent bears the costs of this application.

DATED AND DELIVERED AT NAIROBI THIS 3RD DAY OF NOVEMBER 2021.

D. S. MAJANJA

JUDGE

Court Assistant: Mr M. Onyango

Mr Omari instructed by Musyoki Mogaka and Company Advocates for the Plaintiff.

Mr Njenga instructed by Muchoki Kangata Njenga and Company Advocates for the Defendant.

