

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
CIVIL CASE NO. E081 OF 2024

AMOS NYATTA.....1ST PLAINTIFF
PATRICK MBINGA2ND PLAINTIFF

-VERSUS-

ERIC WALALA (*Assistant Registrar of Companies*)1ST DEFENDANT
SARAH WAINAINA (*Registrar of Companies*).....2ND DEFENDANT
REGISTRAR OF COMPANIES3RD DEFENDANT
VICTOR WERE 4TH DEFENDANT
ALFRED KJLONZO 5TH DEFENDANT
CLORENT MWACHARO..... 6TH DEFENDANT
RONALD MWANYAMA.....7TH DEFENDANT
VALENTINE NGOMBE MRATA 8TH DEFENDANT
DANSON MWACHOKI 9TH DEFENDANT
LEONARD MTIMA10TH DEFENDANT
STANLEY WADUU11TH DEFENDANT
RAPHAEL LEWELA.....12TH DEFENDANT
ABDISTAR HAJI.....13TH DEFENDANT

RULING

1. Before court is a motion dated 16 December 2024 expressed to be brought under Section 1A, 1B and 3A of the Civil Procedure Act, cap. 21; and Order 40 rule 1 and 2 of the Civil Procedure Rules, 2010. The prayers with which the court is concerned at the moment are prayers for injunctive reliefs pending the hearing and determination of the main suit. These prayers have been couched as follows:

“3. That pending the hearing of this suit an order of injunction be granted to restrain the 1st to 3rd Defendants, their agents and/or employees from registering the 1st to 8th Defendants as Directors of The Sagalla Ranchers Limited in pursuance of the

returns made following the Annual General Meeting of Sagalla Ranchers Limited held on 7th December, 2024.

3a) That pending the hearing of this suit the 5th to 13th be restrained from conducting and managing the affairs Sagalla Ranchers Limited in pursuance of the returns made following the Annual General Meeting of The Sagalla Ranchers Limited held on 7th December, 2024.”

2. The applicants have also asked for costs of the suit. The application is supported by the affidavits of the two plaintiffs.
3. The 1st plaintiff has sworn that he is the son of Mrs. Flora George Sowa who is one of the shareholders in the Sagalla Ranchers Limited, which is a private limited company, (hereinafter “the company”) and that the family of Mrs. Flora George Sowa appointed him to represent her interest in the company. With this appointment, the 1st plaintiff has previously been allowed to vote in the company’s meetings. However, on 7 December 2024, during the company’s annual general meeting, he was not allowed to vote, as many other persons who represented deceased shareholders but did not have letters of administration of their respective estates. The 1st plaintiff has urged that fresh elections to be held.
4. In the affidavit sworn by Patrick Mbinga, the 2nd plaintiff, it has been deposed that he has been a director of the company and, amongst other

assets, the company owns over 20,000 acres of land and also operates several bank accounts. The company has 50 shareholders but that *“there is a group of people who claim to have acquired shares in the said entity but their names have not been entered in the list of shareholders”*.

5. Mbinga is a representative of the estate of a shareholder called Jonathan Mbinga Ileli(deceased). On 7 December 2024 he attended the the company’s annual general meeting which was held in Voi. As a representative of the estate of the late Ileli, he was allowed into the voting hall where the elections for directors of the company were being held.
6. The notice of the meeting was issued by the 4th respondent who is alleged to have held himself out as the company secretary of the company yet, according to Mbinga, the 4th respondent was not validly appointed to that office. The 4th respondent is also alleged to be facing criminal charges relating to affairs of other companies which, however, have no relation to the plaintiffs’ company.
7. Besides questioning the validity of the 4th respondent’s actions in relation to the company, many people who represented deceased shareholders of the company could not be allowed to vote because they did not carry letters of administration of the estate of the deceased shareholders. This was contrary to tradition where a member of the family of any particular deceased shareholder had been allowed to vote regardless of whether they

were duly appointed as administrators of the deceased's shareholder's estate or not.

8. To the extent that this category of people was not allowed to vote, the plaintiffs have questioned the validity of the elections in which the 5th to 13th respondents were elected as directors of the company. It is in these circumstances, that the applicants have sought to have them restrained from serving as the directors of the company.
9. The 1st, 2nd and 3rd respondents filed a preliminary objection in which they have urged that the application is moot considering that the elections have been held and results thereof implemented. It has also been pleaded that the question of directorship or shareholding and elections of the company is a civil claim that ought to be urged under the auspices of the provisions of the Companies Act, cap. 486 and not as a constitutional issue.
10. The other ground of the preliminary objection is that the subject matter of the petition *is sub judice* because High Court Civil Case No. 74 OF 2019 which, apparently is pending for determination, is seized of the same matter. As a matter of fact, the impugned elections were the subject of a court order in High Court Civil Case Case No. 74 of 2019 and, thus, this suit is an abuse of the due process of this Honourable Court.
11. The 4th to 13th defendants filed grounds of objection along similar lines as those in in the 1st to 3rd preliminary objection.

12. The 4th respondent filed a replying affidavit in which he introduced himself as the company's company secretary. He has sworn that contrary to the applicants' allegations, there has been no formal resolution or action taken by any validly constituted board of directors terminating his appointment as the company secretary of the company.
13. According to Were, this Honourable Court issued an order on 11 November 2024 directing the convening of an annual general meeting within 30 days, a directive which Were complied with. The planning and the execution of the annual general meeting were conducted transparently, and all shareholders were notified in accordance with the company's constitution and the applicable laws.
14. As far as the criminal charges against him are concerned, Were has sworn that those charges have been withdrawn by the Office of the Director of Prosecution. In any case, those charges cannot be used against him in an unrelated case.
15. The 1st Plaintiff, it has been sworn, lacks the requisite *locus standi* to institute this suit on behalf of the estate of Mrs. Flora George Sowa, having failed to obtain letters of administration as required by law. This deficiency was explained to him during the annual general meeting and, for the same reason, he was not qualified to vote in the meeting.
16. As far as the 2nd plaintiff is concerned, he fully participated in the meeting. He is alleged to be dissatisfied only because he failed to

recapture his seat otherwise, the annual general meeting allowed participation by all legally eligible shareholders including those with Wills, valid Letters of Administration or Grant of Probate, in accordance with the rules governing the representation of deceased shareholders. The 5th to 13th Defendants were validly elected in compliance with the law and that any claims to the contrary are based on misrepresentations and do not negate their legitimate roles.

17. The 4th to 13th defendants replying affidavit was sworn by Raphael Lewela Mbinga. The facts to which he has sworn are along the same lines as those in the affidavit sworn by the 4th defendant. They have added that as much as the plaintiffs are seeking an injunction, they have not demonstrated any irreparable harm they may suffer if injunctive order is not issued.

18. I have considered the submissions by counsel for the applicants and the respondents. Prayer 3 of the application is not viable because a copy of the records at the Business Registration Service dated 10 December 2024 relating to the directors and shareholders of the company shows that, as at that date, the 4th to 13th defendants had been registered as the directors of the company. This copy is among the 4th to the 13th defendant's documents. A restraining order against registration of the 5th to 13th defendants as directors of the company is not viable in these circumstances.

19. The only other primary prayer left in the application is what has been listed in the application as prayer “3a” seeking an injunction to stop the 5th to 13th defendants from conducting the affairs of the company pending the determination of this suit.

20. The principles upon which an injunction pending the hearing and determination of a suit may be granted were set out in **Giella V. Cassman Brown & Co. Ltd [1973] EA 358**. The Court of Appeal revisited these principles in **Nguruman Limited v Jan Bonde Nielsen & 2 others (2014) eKLR**. At the very beginning of its judgment, the Court of Appeal summarised the case before them in the following terms:

“The sole issue raised in this interlocutory appeal is whether the learned Judge of the High Court (Odunga, J.) in granting the 1st respondent’s prayer to restrain the appellant by an order of temporary injunction properly exercised his discretion or whether he misdirected himself in some matter and arrived at a wrong decision. Put differently, this court is being asked to determine whether the 1st respondent presented a prima facie case with a probability of success before the High Court; whether irreparable injury would result if the injunction was not granted and whether there was evidence that the balance of convenience was in favour

of the 1st respondent. See Giella V. Cassman Brown [1973] EA 358.”

21. In disposing of the appeal, the court, in a way, restated the principles in *Giella versus Cassman Brown (supra)* and held:

“Since those principles are already codified by authoritative pronouncements in the precedents they may be conveniently noted in brief as follows:

“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. These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. 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. See Kenya Commercial Finance Co. Ltd V. Afraha Education Society [2001] Vol. 1 EA 86”.

22. The court explained that if an applicant for an injunction establishes a *prima facie* case, that, in itself, is not enough for the court to grant an interlocutory injunction. Besides establishing a *prima facie* case, the court must go further and satisfy itself that if the injunction is declined, the injury the applicant for injunction will suffer, will be irreparable. And by this it is meant that if damages recoverable in law is an adequate remedy and that, in any event, the respondent is disposed to pay those damages, no interlocutory order of injunction should be granted, irrespective of how weighty the applicant's claim may appear to be.

23. According to the learned judges of Appeal, if a *prima facie* case is not established, then the conditions of irreparable injury and balance of convenience need not be considered. In judges' words "*the existence of a prima facie case does not permit "leap-frogging" by the applicant to injunction directly without crossing the other hurdles in between*".

24. And as to what a *prima facie* case entails, the Court adopted the definition given to this phrase in **Mrao Ltd. V. First American Bank of Kenya Ltd & 2 others [2003] KLR 125**. The Court of Appeal defined the phrase in the following terms:

"In civil cases, a prima facie case 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 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 but the evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly a standard, which is higher than an arguable case."

25. The learned judges of appeal explained this to mean that the party on whom the burden of proving a *prima facie* case lies must show a clear and unmistakable right to be protected. This right must be directly threatened by an act sought to be restrained; the invasion of the right has to be material and substantive; and, there must be an urgent necessity to prevent the irreparable damage that may result from the invasion.

26. The court reiterated that in considering whether or not a *prima facie* case has been established, the court does not hold a mini trial and it must not examine the merits of the case closely. All that the court is to consider is that, on the face of it, the person applying for an injunction has a right which has been or is threatened with violation. The position of the parties is not to be proved in such a manner as to give a final decision on disputed facts. In particular, an applicant need not establish title but it is enough if he can demonstrate that he has a fair and bona fide question to raise as to the existence of the right which he alleges.

27. The court further explained that, the standard of proof of that *prima facie* case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the applicant's case is more likely than not to ultimately succeed.

28. As to the condition of irreparable damage, the court held that it is a threshold requirement and the burden is on the applicant to demonstrate, *prima facie*, the nature and extent of the injury. The court noted further:

“Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot “adequately” be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy.”

29. On the question of balance of convenience, the court held that:

“It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or both that the

question of balance of convenience would arise. The inconvenience to the applicant if interlocutory injunction is refused would be balanced and compared with that of the respondent, if it is granted.”

30. Where the court harbours doubt and has to resort to balance of convenience to determine whether or not to grant an injunction, is the “doubt” on whether a *prima facie* case exists or is it on whether damages are an adequate remedy? In **Thathy v Middle East Bank (K) Ltd & another [2002] KEHC 1159 (KLR)**, a case in which, as then an advocate of this Honourable Court, I represented the applicant, Ringera, J. (as he then was) held the view that the doubt is attributed to whether a *prima facie* case exists and not to whether damages are an adequate remedy as the learned judges held in **Nguruman Limited v Jan Bonde Nielsen & 2 others (2014) eKLR**. In the Thathy case, the learned judge held as follows:

“I have now to weigh the above submissions in the light of the settled principles for the grant of interlocutory injunctive relief. Those principles are as follows. First, the applicant must show a prima facie case with a probability of success at the trial. If the court is in doubt about the existence or otherwise of a prima facie case it should decide the application on a balance of

convenience. Secondly, a court will not normally grant an interlocutory injunction unless it can be shown that the applicant is likely to suffer an injury which cannot adequately be compensated in damages: see Giella v Cassman Brown & Co Ltd [1973] EA 358. (Emphasis added).

31. Besides the conditions of *prima facie case* and that of irreparable damage, the learned judge also added another angle to the conditions that an applicant must meet before an order for injunction can be made in his favour. The learned judge held:

Those two (i.e. the condition for prima facie case and irreparable damage) are, if I may so say, the necessary but not the sufficient conditions for grant of interlocutory injunctive relief. Of equal importance is this: an injunction is an equitable remedy and the court may decline to grant the same if it is shown that the applicant's conduct pertinent to the subject matter of the suit does not meet the approval of a court of equity.”

32. It is in light of the foregoing background that the applicants' quest for an injunction has to be considered.

33. As far as the 1st plaintiff is concerned, a more fundamental question, on the viability of his suit against the defendants has been raised. The question is whether he has the necessary *locus* to maintain a suit against

the defendants. The basis of this question is that the 1st plaintiff has not obtained letters of administration to represent the estate of the late Flora George Sowa who was a shareholder in the company. The 1st plaintiff has not denied that he does not have letters of administration and all he has to show is “*an appointment*” by the deceased’s family members that he represents her estate.

34. It has been held **Troustik Union International Ingrid Ursula Heinz versus Jane Mbeyu & Another in Civil Appeal No. 145 of 1990 reported as (1993) eKLR** that under section 82(a) of the Law of Succession Act, cap. 160, the power to agitate, by suit, any cause of action vested in the deceased at the time of his death vests in his personal representative who in turn is defined in section 3 of the Act to mean executor or administrator of a deceased person. And ‘administrator’ means the person to whom letters of grant of administration has been made under the Act.

35. While referring to this case in **Samuel Ngure Gathii v Josephine Wanjiru Mbugua [1998] KECA 125 (KLR)** the Court of Appeal held:

“In the Troustik case, this court reaffirmed what it stated in the case of Otieno vs. Ougo (1982-88) 1 KAR 1049.

The court observed:

"The administrator is not entitled to bring an action as an administrator before he has taken letters of administration. If he does the action is incompetent at the date of its inception".

36. Without belabouring the point, the 1st plaintiff's case is neither viable nor sustainable. It is hereby struck out with costs.

37. The 2nd plaintiff admittedly participated in the company's annual general meeting. It has been claimed that he also contested for directorship of the company but lost. I may not make any conclusive remarks in this respect at this stage of the proceedings; however, for purposes of determining whether the 2nd plaintiff has *prima facie* case against the respondents, I am not persuaded that he has.

38. As much as I understand the applicant, he appears to be agitating for the rights of the people who could not vote because they did not have letters of representation of the deceased shareholders. I suppose if these people had a valid claim against the defendants, they could have been included as parties in this suit although, I must add, without letters of administration their suit would have faced the same fate as the 1st plaintiff's suit.

39. For the foregoing reasons, I am not satisfied that the 2nd plaintiff has a *prima facie* case with a probability of success. Having reached this conclusion, it is unnecessary to consider whether the 2nd plaintiff will suffer any irreparable

damage that cannot be adequately compensated by way of damages if the order for injunction is not granted. In any event, it has not been demonstrated how he will suffer such loss if the order is declined.

40. The final question which may well have been the first question to draw this honourable court's attention is the question whether this suit is *sub judice*, since a similar suit, no. 74 of 2019 is pending in this Honourable Court. Based on the material before me, all I can gather is that the annual general meeting held on 7 December 2024 in which the impugned elections were held was informed by the order issued in that suit by this Honourable Court. To the extent that it is relevant to the question at hand, the order read as follows:

“It is hereby ordered:

1) That the annual general meeting be carried out within the next 30 days.

2) that the company secretary to give notice of annual general meeting in accordance with the company's constitution.

3) That in default, the directors of the company shall be individually held in contempt of the court orders.

4) That the registrar of companies to ensure that there is a smooth process.

5) That the Voi OCPD to give security during the annual general meeting.

6) That the ruling dated 19/1/2024 is overtaken by events.

7) That the matter be mentioned on 3/2/2025

Given under my hand and the seal of this Honourable Court this 11th day of November, 2024.”

41. There are six defendants in that suit two of whom are the plaintiffs in the instant suit. The plaintiff in the previous suit is named as the company. The substratum of that suit, which is the annual general meeting of the company, is the same primary issue in this suit. The parties are, more or less the same, save that the directors of the company who were elected in the annual general meeting ordered by the court and the company secretary have now been included in the instant suit as defendants.

42. The plaintiffs appear to suggest that since this matter has been filed in the Constitutional and Judicial Review Division, it is different from civil suit no. 74 of 2019. This is how they have pleaded in paragraph 18 of the plaint:

“The Plaintiff states that to the extent that this matter involves many other parties other than the ones in the aforementioned suit of Mombasa HCCC No. 74 of 2019 and to the extent that this

matter involves actions that took place on 7th December, 2024 this suit is therefore not affected by the existence of the said suit. Further, on account of the wrongful acts of the 1st, 2nd and 3rd Defendants, this suit is filed in the Constitutional and Human Rights Division of the High Court.”

43. The fact that a suit has been filed in the Constitutional and Judicial Review Division when it is, in fact, an ordinary suit, does not change its character. It is still a civil suit regardless of the description given to it by the plaintiffs or the Division in which it has been filed.

44. That said, I suppose that the reason the court in suit no. 74 of 2019 directed that the matter should be mentioned before it after the annual general meeting, is because, in the court’s opinion, it was disposed to deal with any issues that may have arisen post the annual general meeting, including issues surrounding the impugned elections. It was up to the court to determine whether those issues could be properly determined in the context of the suit before it and, for this reason, the court ought to have been given the opportunity either to dispose of the issues arising after the annual general meeting or give such directions as are necessary or as moved by any of the parties to the suit before the court before the instant suit was filed.

45. Section 6 of the Civil Procedure Act provides as follows:

6. Stay of suit

No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.

46. In the wake of this provision of the law, and for reasons I have given, I not only hereby dismiss the applicant's application with costs but I also order that the suit be stayed pending the outcome of civil suit no. 74 of 2019. Orders accordingly.

Signed, dated and delivered on 31 October 2025

Ngaah Jairus
JUDGE