

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
COMMERCIAL & ADMIRALTY DIVISION
CASE NO. E029 OF 2024

**MARY WANJIRU KAMANDE (Suing on behalf of the
Estate of JOHN KAMANDE MWANIKI(DECEASED)).....
....PLAINTIFF/APPLICANT**

-VERSUS-

**OCEAN DISTRIBUTORS LIMITED....1ST DEFENDANT/RESPONDENT
ROBERT SAFARI MZUNGU.....2ND DEFENDANT/RESPONDENT
ALI SAID BASMER.....3RD RESPONDENT
DAVID MAKAU NDOLO.....4TH RESPONDENT
RYAZAL AHMED ABDALLA.....5TH RESPONDENT**

RULING

1. The motion before court is dated 25 April 2024 and is expressed to be made under Order 51(1) Civil Procedure Rules, sections 780 (1) and 782 (1) and (2) Companies Act No. 17 of 2015; and, Sections 1A, 1B, 3, 3A, apparently of the Civil Procedure Act, cap. 21. The prayers sought have been couched as follows:

***“1.This Application is certified urgent and be heard ex-parte in
the first instance.***

***2.Temporary /interim injunction do issue restraining the
directors/ shareholders of Ocean Distributors Limited, the 1st
defendant herein (hereinafter 'ODL') by themselves and/ or their
agents, servants, employees, assignees or any other person acting
for them or on their behalf from transferring, selling, leasing,***

exchanging, disposing of or dealing in any manner with the properties and/ or assets of the ODL pending the hearing and determination of this application.

3. Temporary/interim injunction do issue restraining the directors/ shareholders of Ocean Distributors Limited, the 1st defendant herein (hereinafter 'ODL') by themselves and/ or their agents, servants, employees, assignees or any other person acting for them or on their behalf from transferring, selling, leasing, exchanging, disposing of or dealing in any manner with the properties and/ or assets of the ODL pending the hearing and determination of this suit.

4. An order does issue directing the 2nd - 5th Respondents to account for the dividends on shares held by the deceased as director of ODL and other emoluments due to the deceased since 2019 to date.

5. An order does issue directing the 2nd - 5th Respondents to conclude the process of the ongoing sale of the deceased shares and the subsequent removal of his name from the CR12 of ODL.

6. An injunction does issue directing the 2nd -5th Respondents to convene the directors/ shareholders meeting to discuss the pertinent issues among them certified and audited accounts of the

Company for the last 5 years and Forensic Audit Reports of 2018 & Shares Valuation Report by Wambugu Wangai and Company CPA, to expedite the process of sale of shares and removal of the deceased name from CR12 as director/shareholder of the 1st Respondent(ODL), pending the hearing and determination of suit.

7. An order does issue compelling the 2nd - 5th Respondents to effect full payment of rent arrears and utilities on the deceased's property built on Plot No. 505 Kenyatta Street Malindi rented to the 1st Respondent(ODL) for business and registered as property of the late John Kamande Mwaniki (deceased).

8. An order does issue compelling the 2nd - 5th Respondents to remove the deceased name from the Guarantee Agreement where the 1st respondent(ODL) as borrower, obtained facility of up to Kenya Shillings (Kshs. 160,000,000/=) where a legal charge over the deceased's Land Parcel No. Kilifi/Mbaraka Chembe 195 remains in force guaranteed by the deceased during his lifetime which title document was released to the deceased pending.

9. Any other order that this Honorable Court may deem fit to grant.

10. Costs of this application be provided for.”

2. The application is supported by the affidavit of Mary Wajiru Kamande who has sworn that she is the widow and the administratrix of the estate of the late John Kamande Mwaniki who died on 11 March 2024.
3. Prior to his death, the deceased was one the directors and shareholders of the 1st respondent. He held 173 ordinary shares. Due to ill health the deceased was to resign as a director and dispose of his shares to Robert Mzungu who, at the time material to this suit, was the managing director of the 1st respondent.
4. The deceased had also guaranteed a loan facility of upto Kshs. 160,000,000/= borrowed by the 1st respondent. A legal charge was created on the deceased's property known as LR. Kilifi/Mbaraka Chembe 195. The charge and guarantee remain in force to date.
5. The deceased confirmed that he was informed verbally to collect the title to the said land parcel Kilifi/Mbaraka Chembe 195 from the charger and thereafter sign a letter to that effect; however, the deceased had not collected the title by the time he died. The applicant has been advised by her advocates, which advice she verily believes to be true, that because of the guarantee which the deceased had signed, the deceased's estate may be sold in the event of default in the repayment of the facility. The estate will only be safe once the deceased's name has been expunged from form CR12 filed with Registrar of Companies after completion

of the sale of the deceased's shares and subsequent removal of his name as a director and a shareholder of the 1st respondent.

6. The applicant also contends that since 2019, the deceased had not received his dividends on his shares and emoluments from the 1st respondent. The applicant fears that following the demise of the deceased, his shares may be unlawfully disposed of or otherwise his estate intermeddled with by the 2nd to 5th respondent to the prejudice of the deceased's beneficiaries.
7. Besides the unpaid dividends, the 1st respondent which has rented the deceased's premises is in rent arrears.
8. The respondents have contested the applicant's application and, to that end, they have filed a replying affidavit sworn by the 2nd respondent on his own behalf and on behalf of the rest of the respondents.
9. As far as the sale of the deceased's shares in the 1st respondent company is concerned, the respondents have sworn that the negotiations between the deceased and the directors of the 1st respondent on disposing of the deceased's shares did not yield any agreement. In the circumstances, the beneficiaries of the deceased's estate are entitled to the shares upon conclusion of the succession proceedings. The current directors will transfer the shares in accordance with the orders of the court in the succession proceedings.

10. The only business the 1st defendant has hitherto undertaken is to act as a sole distributor of British American Tobacco (BAT) products in the coast region. The distributorship was terminated by BAT as a result of which the 1st respondent's operations were disrupted. As a matter of fact, there is a pending dispute in court over the 1st respondent's contract with BAT. The suit is registered in this Honourable Court as Suit No. E008 of 2024.
11. As far as the dividends are concerned, the deceased had been paid his dividends prior to his death. And with respect to the charge over the deceased's property Land Parcel No. Kilifi/Mbaraka Chembe 195, it was fully discharged and the title collected from the bank. The deceased acknowledged receipt of the title by signing for it in the bank's delivery book.
12. As for the rent arrears, the respondents have disputed the contention that there are rent arrears owed by the 1st respondent. While they admit that the 1st respondent is the deceased's tenant, they state that all the rent due has been fully paid.
13. I have considered the applicant's application, the response thereto and the submissions filed on the positions the contesting parties have adopted on the application.
14. Although the applicant has stated that she is the administratrix of the deceased's estate, there is no proof of this fact on record. A grant of representation is not amongst the documents exhibited on the applicant's

affidavit in support of the application; neither is the grant in the list of documents filed by the applicant in support of her case. In fact, it is not clear from the pleadings filed, the stage at which the succession proceedings have reached, if at all they have been filed, and whether the applicant has obtained any sort of grant, including one limited to the filing and prosecution of these proceedings.

15. That aside, the rest of the facts do not appear to be in dispute. Although no death certificate certifying the death of John Kamande Mwaniki has been exhibited, it is common ground that Mwaniki is deceased. Parties are also in agreement that the deceased was both a director and a shareholder of the 1st respondent company at the time of his demise. However, negotiations on the sale and transfer of his shares had not culminated into any concrete agreement at the time of his death.

16. The applicant's quest in this application is for the conclusion of the negotiations and for the deceased to be removed from the 1st respondent as both a shareholder and a director. She also wants the 1st respondent restrained from disposing of the 1st respondent's properties pending the hearing and determination of this suit. She has also sought payment of the dividends due from the 1st respondent to the deceased or his estate. The applicant also wants discharge of charge registered against the deceased's property, Land Parcel No. Kilifi/Mbaraka Chembe 195 and the deceased's guarantee and payment of the rent arrears.

17. Looking at the pleadings and the affidavits filed by either of the parties, there is no danger that the deceased's shares are exposed to any danger of being disposed of. The applicant has not demonstrated that, in the wake of the deceased's death, she has sought but failed to transfer the deceased's shares either to herself or to any other person for that matter. In any event, none of the respondents can deal with the deceased's shares without an order from the succession and probate court on the distribution of the deceased's estate which, in this case, would include his shares.
18. The disposal of the deceased's estate is subject to the determination of the succession proceedings in respect of the deceased's estate which cannot be distributed, disposed of or dealt with in any other manner than what the succession and probate court will prescribe. The burden on the applicant was to demonstrate what the succession court has directed with respect to the deceased's shares. In short, this court cannot direct disposal of the deceased's estate contrary to the Law of Succession Act, cap. 160. At any rate, the court cannot direct on when and how the deceased's shares should be disposed of at an interlocutory stage of the proceedings.
19. As far as the question of transfer of the 1st respondent's property is concerned, it has not been shown that apart from its share capital, the 1st has any other property which is in danger of either being disposed of or dealt with in a manner prejudicial to the deceased's estate's interests.

20. On the question of dividends, the respondents have given a schedule of the payments made to the deceased on account of dividends due to him. Contrary to the applicant's contentions, there is evidence that between 2019 and 2024, the deceased was paid dividends amounting to Kshs. 4,050,100. This evidence has not been controverted.
21. There is also evidence that the title to the deceased's property was handed over to him, a fact, that in itself, implies that the charge on the property was discharged. There is no contrary evidence to the effect that the property is encumbered in any way or that the deceased is still bound by a guarantee he made for the repayment of the loan in the event of default by the 1st respondent.
22. On the question of rent arrears, the applicant has not demonstrated how much rent is in arrears and for what period. More importantly, the respondent's evidence that all the rent due to the deceased's estate has been paid has not been controverted by the applicant.
23. For the foregoing reasons, I am not satisfied that the applicant's application has met the threshold set out in **Giella V. Cassman Brown & Co. Ltd (1973) EA 358** for grant an injunction pending the hearing and determination of the main suit. In short, the applicant has not demonstrated a *prima facie* case with a probability of success; she has not shown that she will suffer irreparable injury if a temporary injunction is not granted; and, finally, she has not demonstrated that the balance of

convenience would tilt in favour of granting an injunction in the event of doubt on whether there exists a *prima facie* case. In the ultimate, the applicant's application is hereby dismissed with costs. It is so ordered.

Signed, dated and circulated on the CTS on 20 February 2026

Ngaah Jairus
JUDGE