



**Mukuha v Naivas Limited & 2 others (Civil Appeal 39 of 2017)
[2021] KECA 344 (KLR) (17 December 2021) (Judgment)**

Neutral citation: [2021] KECA 344 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 39 OF 2017
RN NAMBUYE, F SICHALE & S OLE KANTAI, JJA
DECEMBER 17, 2021**

BETWEEN

NEWTON KAGIRA MUKUHA APPELLANT

AND

NAIVAS LIMITED 1ST RESPONDENT

SIMON GASHWE MUKUHA 2ND RESPONDENT

DAVID KIMANI MUKUHA 3RD RESPONDENT

(Being an appeal from the Ruling/Orders of the High Court of Kenya at Nairobi (Nzioka J) dated 14th November 2016.) IN (Nairobi High Court Civil Suit No. 475 OF 2013)

JUDGMENT

1. This is rather an unfortunate litigation pitting close siblings, the appellant and his two brothers (the 2nd and 3rd respondents). Be that as it may, Newton Kagira Mukuha (the appellant herein) has filed this appeal against the ruling of Nzioka, J. dated 14th November 2016.
2. The brief facts in this appeal are as follows. Vide a plaint dated 31st October 2013, the appellant sued the 2nd and 3rd respondents seeking inter alia an order of injunction to restrain the 2nd and 3rd respondents from interfering with shares of Naivas Limited (the 1st respondent herein). Subsequent thereafter, the appellant filed 3 different applications dated 31st October 2013, 11th December 2014 and 13th May 2016 respectively, seeking *inter alia* the following orders:

“an order for injunction to restrain the 2nd and 3rd respondent from interfering with Naivas Limited shares until the hearing and determination of the petition, an order for temporary injunction to restrain the 2nd and 3rd respondents from selling, alienating, disposing, interfering, charging, doing anything prejudicial to the applicant and order of injunction to



restrain the 2nd and 3rd respondents' from selling, transferring and or in any other manner dealing with the shares and property of the 1st respondent company.”

3. The applications were consolidated heard and dismissed by Nzioka, J. on 14th November 2016.
4. The appellant was aggrieved by the aforesaid ruling thus provoking the instant appeal vide a Memorandum of Appeal dated 10th February 2017, raising the following grounds of appeal:
5. That the learned judge erred in law and fact by:
 1. Failing to consider that there existed a constructive trust created by the 2nd and 3rd respondents when they incorporated Rongai Self Service Stores Limited and subsequently the 1st respondent leaving out the appellant, and other contributors from the list of shareholders and directors in the incorporation documents.
 2. Misdirecting and prejudicing herself against the appellant's case in ignoring the fact that the 1st defendant company's history annexed to the appellant's application and therefore reached an erroneous decision occasioning a miscarriage of justice.
 3. Laying emphasis on the evidence tendered by the appellant whose production as evidence was neither opposed by the respondents herein and therefore reached an erroneous decision occasioning a miscarriage of justice.
 4. Putting relevance and reliance on an erroneous and misleading set of facts presented by the 2nd respondent and basing her ruling on the same occasioning a miscarriage of justice.
 5. Ignoring cogent reason (s) and explanations placed before her by the appellant and instead taking into account irrelevant matters not placed before her reaching an erroneous conclusion in law and occasioning a serious miscarriage of justice.
 6. Taking into consideration irrelevant factors and basing her ruling on them and in the same breadth failing to take into account relevant factors occasioning a serious miscarriage of justice.
 7. Totally ignoring responses given by the 2nd respondent during cross examination and dismissing all three applications by the appellant herein.
 8. Holding that the appellant was a vexatious litigant by putting relevance and reliance on an erroneous and misleading set of facts thereby occasioning a miscarriage of justice.
 9. Misdirecting herself on the law relating to the *Companies Act* CAP 486 and reached an erroneous conclusion in law occasioning miscarriage of justice; and lastly,
 10. Ruling and reasoning plainly wrongly and erroneously in law given the factual circumstances obtaining in the application before him.



6. The appeal was urged by way of written submissions with oral highlights by the parties on 27th September 2021. The appellant appeared in person while learned counsel, Mr. Kiiru appeared for the respondents.
7. The appellant submitted that the crux of his applications was that he had instituted proceedings against the respondents on the basis of a constructive trust. In the applications the appellant sought interim injunctive reliefs prohibiting the respondents from selling, transferring, allotting or in any other way interfering with the shareholding of Naivas Limited, pending the hearing and determination of the main suit. It was his contention that there existed constructive trust when the family of Peter Mukuha Kago, (the deceased), made contributions towards the formation of a family business and that as such, he had established a prima facie case with a high probability of success.
8. With regard to grounds 4-10 of the appeal, he submitted that the learned judge failed to exercise her discretion judiciously since the ruling was based on extraneous matters namely; on whether the suit was *res judicata* and that the court relied on the ruling in Nakuru High Court Succession Cause No. 92 of 2011 by Emukule, J. It was his position that Emukule, J. sitting then as a Succession Cause Court could not determine the question of ownership/ shareholding of Naivas Limited.
9. On the other hand, it was submitted for the respondents that the appellant had raised several grounds of appeal but the grounds raised did not address the issues that the High Court took into consideration in dismissing the appellant's three applications namely:
 1. "Whether the 1st respondent was properly joined before in the case.
 2. Whether the appellant's applications are Res Judicata.
 3. Whether the appellant on the facts as laid before the court was entitled to an order of interim injunction or the appellant's application for an injunction was merited."
10. On the first issue, it was submitted that the appellant filed Nairobi HCCC No. 475 of 2013 against the 2nd and 3rd respondents and on 9th September 2014, he filed an amended plaint and joined Naivas Limited (the 1st respondent) as party to the said suit, which amendment was made without leave of the Court. It was submitted thus that it was an abuse of the court process for the appellant herein to purport to join Naivas Limited to the said suit through an amended plaint without leave of the Court.
11. As to whether the appellant's applications were *res judicata*, it was submitted that the issues raised in the High Court and the parties therein were similar to those canvassed in Nakuru High Court Succession Cause No. 92 of 2011, wherein Emukule, J. (rtd), in a ruling delivered on 31st October, 2014, held that the appellant had no interest, legal or equitable in Naivas Limited. That, in the above mentioned Succession Cause, the appellant had further prayed for injunctive orders to restrain the respondents from intermeddling with the deceased's estate and specifically interfering with the shares of Naivas Limited owned by the deceased. It was thus submitted that it was clear that the appellant was principally seeking to be declared an equitable or legal owner of shares in Naivas Limited which issue had already been dealt with in the Succession Cause and was thus *res judicata*.
12. Finally, as to whether the appellant's plea for interim injunctive orders were merited, it was submitted that the High Court properly and rightfully declined to grant the same as the appellant had failed to meet the threshold set forth in *Giella v Cassman Brown* (1973) EA 358. Consequently, the respondents urged this Court to dismiss the appeal with costs and uphold the ruling of the High Court.



13. We have considered the grounds of appeal, the appellant's submissions dated 6th September 2021, the respondent's written submissions dated 22nd September 2021, the oral submissions made before us, the authorities cited and the law. We are required as a first appellate court by rule 29(1) of the Court of Appeal Rules, to re-appraise the evidence and to draw inferences before coming to our own independent conclusion.

See *Selle & Another v Associated Motor Boat Co. Ltd & Others* (1968) EA 123.

14. The appellant in the High Court was essentially seeking injunctive orders to stop the respondents from interfering, meddling, or dealing with the shareholding and/or assets of Naivas Ltd in a manner prejudicial to him.
15. Firstly, and as was rightly observed by the High Court, Naivas is not a party to these proceedings as it was not a party to the initial plaint dated 31st October 2013. The inclusion of the 1st respondent in these proceedings vide the amended plaint filed on 3rd September 2014 was improper and irregular as the same was filed without leave of the court. It follows therefore that no injunctive orders could be issued by the High Court against Naivas Ltd as it was not properly a party to the High Court proceedings.
16. Be that as it may, it is contended by the appellant that the learned judge failed to exercise her discretion judiciously as the ruling was based on extraneous matters on whether the issues raised therein were *res judicata*. It is indeed not in dispute that in the instant appeal the appellant had sought injunctive orders to stop the respondents from interfering, meddling, or dealing with the shareholding and/or assets of Naivas Ltd in a manner prejudicial to him. It is also not in dispute that vide summons dated 2nd November 2012, in Nakuru High Court Succession Cause No. 92 of 2011, the appellant had, *inter alia* sought the following order against the 2nd respondent:

“that pending hearing inter-partes and determination of this application a temporary injunction be issued restraining the petitioner, either by himself, servants, employees and/or authorized agents from howsoever inter-meddling with the deceased estate herein, and specifically from interfering with Naivas limited shares owned by the deceased.” (Emphasis supplied).

17. Further, it is not in dispute that on 10th July 2013, the appellant, again in the same proceedings had filed another notice of motion application seeking similar orders as the one he sought in the summons dated 2nd November 2012. Emukule, J. (rtd), in a ruling delivered on 31st October 2014 *inter alia* rendered himself as follows:

“clearly therefore, the objector has no interest, legal or equitable in Naivas Limited. His interest in the 10,000 shares held by their father in Naivas limited is co-equal with that of the petitioner and other children of the late Peter Mukuha Kago, and even then, only upon intestacy. In this case, the objector does not in any of his affidavits dispute the validity of his father's will, and the distribution of the 10,000 shares or 20% of their father's interest in Naivas limited. These shares will as already stated be transmitted in accordance with the terms of the will.

He will therefore have no interest at all in Naivas Limited. In the upshot therefore the objector's applications dated 2nd November 2012 and 9th July 2013 are dismissed with costs to the petitioner and the estate of the late Peter Mukuha Kago.” (Emphasis supplied).

18. It is imperative to note that the appellant has never appealed against the aforesaid ruling. Whereas the appellant contended that the learned judge failed to appreciate that Emukule, J. sitting as a Succession



Court could not determine the question of ownership/shareholding of Naivas Limited, it was the same appellant who had filed the motion dated 2nd November 2012, seeking similar injunctive orders against the 2nd respondent. How then can he turn around and say that the Court (Emukule, J.) could not issue the orders that were issued on 31st October 2014? We think the appellant is blowing hot and cold, a situation we are not prepared to countenance.

19. Finally, it was contended that the learned judge's ruling and reasoning was plainly wrong and erroneous in law given the factual circumstances obtaining in the application before her. The learned judge in her ruling at paragraph 27 while considering the applications stated:

“27. in that regard to avoid duplicity, I shall now turn to the main prayer in all the applications an order for an injunction to stop the respondents from interfering, meddling, or dealing with the shareholding and/or assets of the 1st respondent, in a manner prejudicial to the applicant. The legal principles for guiding the grant of injunction were down in the case of *Geila vs. Cassman Brown & Co. Ltd* 1973 EA 358

The applicant must make out a prima facie case with a probability of success at the trial.

Normally an injunction will not be granted unless it can be shown that the applicant is likely to suffer irreparable injury which cannot be adequately compensated in damages.

If the court is in doubt it should decide the case on a balance of convenience.”

20. Again at paragraph 36 of the ruling, the Learned Judge stated thus:

“36. I therefore agree with the respondents' submissions that the issue of the applicant's ownership of shares in Naivas Limited has been dealt with and is thus res judicata. But, even still, the respondent submitted there is no appeal against the ruling delivered by Hon Justice Emukule. It therefore follows that, the ruling delivered by Hon Justice Emukule still stands. It was not in favour of the applicant. That determines the applicant's arguments of having a prima facie case. The applicant's submissions and assertions that the issue of res judicata is “quite thin veiled and draconian” is therefore unsupported. (Emphasis supplied.)

37. The next question is this; assuming the applicant has established a prima facie case, can he be adequately be compensated by an award of damages? My answer is in the affirmative. This matter involves ownership of shares in a limited liability company. A share is a unit of ownership in a company and is capable of quantification in monetary terms. The applicant alleges that the respondents' intent to transfer some shares to a third party, even then, if he were to succeed in this suit, he can still be compensated in monetary terms, assessed on the value of shares at the time of disposal or interference.”

21. From the above passages reproduced from the ruling of the High Court, and contrary to the appellant's assertions, it is indeed evident that the judge in a well-reasoned ruling considered the laid down principles that govern applications for grant (or otherwise) of temporary injunctions. In our view, it has not been demonstrated to the satisfaction of this Court that either the Judge exercised her discretion wrongly or took into account irrelevant factors or failed to take into account relevant factors. Consequently, nothing turns on this ground of appeal and the same fails.



22. On the same note and from the circumstances of this case, perhaps the appellant should take note of the observation by the learned judge at paragraph 44 of the ruling where she states that:

“I am convinced that, filing of flurry of applications herein over the same subject matter amounts to an abuse of the court process and is a perfect example of a “vexatious litigant”. Courts frown on such conduct and it should be discouraged at all cost.”

23. We believe we have said enough to demonstrate that the appellant’s appeal is without merit and the same is hereby dismissed in its entirety. Costs to the respondents.

24. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 17TH DAY OF DECEMBER, 2021.

R. N. NAMBUYE

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

