Mwige v Karani & 2 others (Commercial Suit E310 of 2024)
[2025] KEHC 499 (KLR) (Commercial and Tax) (24 January 2025) (Ruling)

Neutral citation: [2025] KEHC 499 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

COMMERCIAL SUIT E310 OF 2024

BM MUSYOKI, J

JANUARY 24, 2025

BETWEEN

KENNETH NYAGA MWIGE ..... PLAINTIFF

AND

WINIFRED WANGARI KARANI ..... 1ST DEFENDANT

AKIBA PROPERTIES (KENYA) LIMITED ..... 2ND DEFENDANT

ANTHONY PHILIP GITAO, WINIFRED LUCY WANGARI KARANI GITAO & SOSPETER NATHAN GITAO (SUED AS ADMINISTRATORS OF THE ESTATE OF EDITH WANJIKU GITAO) ..... 3RD DEFENDANT

RULING

1. By application dated 6th June 2024 the plaintiff prays that this court grants him the following orders;
    1. Spent.
    2. An order compelling the 1st defendant to pay the loan arrears of USD 12,965.81 and thereafter pay USD 4,000 per calendar month until she meets 50:50 loan repayment parity with the plaintiff pending interpartes hearing and determination of the application.
    3. An order compelling the 1st defendant to pay the loan arrears of USD 12,965.81 and thereafter pay USD 4,000 per calendar month until she meets 50:50 loan repayment parity with the plaintiff pending interpartes hearing and determination of the suit.
    4. An order of preservation of the funds belonging to the defendants held at the client account of Waruhiu & Co Advocates pending hearing and determination of the application.

5. An order of preservation of the funds belonging to the defendants held at the client account of Waruhiu & Co Advocates pending hearing and determination of the suit.

6. In the alternative an order compelling the defendants to deposit Kshs 40,000,000.00 proceeds for sale of land reference number 4148/94 (original number 4148/11/76) and indeed income from sale of various properties belonging to the defendants in a joint interest earning account or in court pending hearing and determination of the application.

7. In the alternative an order compelling the defendants to deposit Kshs 40,000,000.00 proceeds for sale of land reference number 4148/94 (original number 4148/11/76) and indeed income from sale of various properties belonging to the defendants in a joint interest earning account or in court pending hearing and determination of the suit.

8. The cost of the application be in the cause.

2. The application is supported by the plaintiff's affidavit sworn on 6th June 2024. The plaintiff avers that he was married to the 1st defendant who is a sibling to Antony Philip Gitao and Sospeter Nathan Gitao who are named as the 3rd defendants. The plaintiff and the defendants are equal shareholders of the 1st interested party which is said to have been incorporated as a commercial vehicle for their business ventures during the subsistence of their marriage. The plaintiff adds that the 1st defendant's shareholding was his gift to her by reason of their marriage.

3. It is the plaintiff' case that the 1st defendant approached him in 2014 and proposed that they invest in land parcel number 4148/11/76 which the 1st defendant had inherited from the estate of her father and which had been invaded by squatters and was at the risk of being lost. Since the 1st defendant and her mother and siblings did not have money or ability to develop the property or even access it, the plaintiff was to use his money and resources to secure possession and make the property useful.

4. he plaintiff states that he bought the idea and him and the 1st defendant with approval of the 1st defendant's mother entered into a joint venture agreement where the plaintiff was to provide funds and resources for the investment including removing squatters and developing the property while the 1st defendant would contribute in the joint venture by giving out the land for the joint investment. The plaintiff claims that the 1st defendant's mother who is now deceased knew of the arrangement and approved the same and further that the 1st defendant's siblings were financially incapable of helping in the venture. He adds that the siblings had actually no interest in the property since it had been willed to the 1st defendant. The 1st defendant was upon completion of the project to hold the property in trust of herself, the plaintiff and their children.

5. Following the above arrangements, the plaintiff halted his other development plans and concentrated on the joint venture and proceeded to obtain two loans from the 2nd interested party to the tune of Kshs 4,000,000.00 and USD 343,979.70 with the latter being secured by first charge over his parcel number L.R number 209/4401/362. The legal charge has been exhibited as annexure KNM-4. The plaintiff claims to have proceeded to finance pre-project expences which included approvals from the County Government of Kiambu and development of policy documents, professional fees and squatter resettlement costs. In proof of this, the plaintiff exhibited copies of approvals of the county government and receipts for the professionals.

6. Further, the plaintiff claims that the property was converted to a business premises under the name Karani Boxpark and the 1st interested party was to get a long-term commercial lease to mitigate the identified risks and financial exposure and allow reasonable profit returns and all the income from the property was to be applied towards repayment of the commercial loans he took from the 2nd

interested party. The 1st defendant and the estates of her father and mother contributed nothing in this development.

7. The plaintiff acknowledges that he did due diligence and found that the property was beneficially owned by the 2nd defendant who had been incorporated by the 1st defendant's father on 17th January 1973 which was at the time of his demise owned 75% by him and 25% by the 1st defendant's mother. The plaintiff adds that upon completion of the project in 2016, the same was occupied by tenants thereby generating rental income of Kshs 1,019,343.33 per month with leases being drafted and prepared by the 1st defendant.

8. The plaintiff has also averred that on 30-11-2017, the 1st defendant deserted their matrimonial home and left with their children and subsequently instituted divorce proceedings in the chief magistrate's court. She thereafter frustrated the business at the premises by sending prospective buyers thereby interrupting the flow of income and eventually forced the tenants to vacate. The 1st defendant subsequently sold the suit property to Scolastica Wambui Kibathi for Kshs 40,000,000.00 which was according to the plaintiff less than its true value. This was despite the plaintiff offering to buy the same at Kshs 60,000,000.00. Due to these frustrations, the plaintiff has been forced to default in repayment of the loans obtained from the 2nd interested party and is now at the risk of losing his charged property through foreclosure by the 2nd interested party.

9. The plaintiff claims to have discovered that the Will by the 1st defendant's father was forged by the 1st defendant and in the same breath states that the Will was taken to the deceased at his sick bed by the 1st defendant and her mother. He ends by stating that if the orders sought are not granted, he is likely to suffer irreparable damages as the sale proceeds held by the 3rd interested party will be wasted or divested to defeat the course of justice.

10. The application has been opposed by the defendants through affidavits sworn by the 1st defendant and Anthony Philip Gitao dated 28th June 2024 and 15th July 2023 respectively. In reaction to the application, the 2nd interested party filed an application to strike out its name from the suit and a supplementary affidavit of one Edna Omangi dated 10th September 2024.

11. The defendants deny the narrative given by the plaintiff. The 1st defendant depones that the marriage to the plaintiff has been tumultuous due to the conduct of the plaintiff whose specifics I need not reproduce in this ruling. During the subsistence of marriage, the parties bought an apartment on L.R. number 1/285 (original number 1/68/2) upon which the parties agreed to have an investment vehicle and that is when the plaintiff disclosed to her that he had incorporated the 1st interested party with his brother. Upon further discussions, it was agreed that the plaintiff's brother will transfer his one share in the 1st interested party to the 1st defendant and the company allocates her 2499 shares so that she matched the plaintiff's shareholding. The plaintiff is said to be in full control of the company. The 1st defendant avers that the plaintiff and herself used the 1st interested party to purchase another apartment on LR number 1/285 (original number 1/68/2). The plaintiff lives in one of the apartments with his current family without paying any rent to the 1st interested party.

12. The 1st defendant has averred that a day after her father died, without letting her mourn, the plaintiff started pushing her to sign documents to enable him obtain loan from one Tom Sharpe. The 1st defendant adds that, her father who owned 51% shares in the 2nd defendant distributed in his Will, his shares in the 2nd defendant to his children and grandchildren and his interests in LR number 4148/94 to the 1st defendant. Upon the death of their father, her mother obtained probate and the estate was distributed and confirmed on 29th October 2013 and the plaintiff who knew of the proceedings did not object to the same.

13. In January 2013, the 1st defendant discovered that the plaintiff was attempting to use the suit property to obtain loan from Tom Sharpe when the plaintiff inadvertently forwarded his email correspondence with Tom Sharpe to her. When she lost her job through relocation in 2013, the plaintiff resorted to insults and intimidation on her demanding that she should bring something to the table. And in the same year, the plaintiff came up with idea of developing the suit property and started looking for investors where he presented himself as the owner of the suit property.

14. There was a lull on the above idea until September 2015 when the plaintiff came up with another idea of a container city during which time, the 1st defendant's mother was battling a serious sickness and the plaintiff bore a child out of the wedlock. The 1st defendant avers that with this kind of environment, she could not have allowed a discussion between them over a joint venture. The plaintiff took advantage of this distraction and put containers in the suit property. She adds that there were no squatters in the property at all and since the 1st defendant and her siblings were busy taking care of their seriously sick mother, they did not have the energy to engage the plaintiff in the fights over the suit property. During this time, the plaintiff did not help the family and any approach by the 1st defendant was met with insults and cruelty. Their mother died in 16th May 2017.

15. The 1st defendant claims that she learned in January 2018 that, the plaintiff had moved to Nairobi with his second family and they were running container business on the property and she started demanding that they vacate. As a reaction to the demand, the plaintiff made several intimidating actions as against the 1st defendant. These included reporting her to the children's department, withholding their children's school fees, demanding that the 2nd defendant issues a lease to the 1st interested party, filing case number 90 of 2021 in the Business Premises Rent Tribunal between the 1st interested party and the 2nd defendant where he tried to stop anticipated sale of the property to a 3rd party, filing complaint with Director of Criminal Investigations against her, writing complaint to the 1st defendant's former employer, writing complaint to the 1st defendant's church leadership, writing complaints to the Mombasa Law Society, sending inciting messages to their children, threatening to drag her late mother's succession cause and citing the 1st defendant for contempt of court in Thika ELC Misc No 50 of 2021 (formerly milimani High Court Misc cause number E389 of 2021).

16. The replying affidavit of Anthony Philip Gitao sworn on behalf of the 2nd and 3rd defendants does not say much different from what the 1st defendant has stated. He claims that this is not a commercial dispute but a disguised fight between former in-laws which has no commercial aspect in it. He adds that the suit property was owned by the 2nd defendant but their father bequeathed his interest in the property to the 1st defendant. He adds that the averments in this suit are different from the averments in the business premises rent tribunal case. He denies that the 2nd defendant entered into any joint venture agreement with the plaintiff. He adds that the suit property was sold to a third party although the plaintiff has refused to remove some of his containers. He also claims to have been a victim of the plaintiff's messages of intimidation.

17. This application was argued by way of written submissions. The plaintiff filed two sets of submissions. One is dated 5th August 2024 and the other one is dated 25th October 2024. The defendants' submissions are dated 3rd October 2024. I have not seen any submissions from the interested parties. I have read the parties pleadings, affidavits and submissions and as much as I understand the application, the prayers are for both mandatory and mareva injunctions. For the plaintiff to succeed in an application of this nature, he must in addition to the principles established for an interlocutory injunction, be able to establish that the application and actually the suit is clear and justifiably stands very high chances of success and that there are special circumstances such that if the orders are not issued, the suit will be rendered an academic exercise.

18. In Kenya Breweries Limited & Tembo Co-operative Savings & Credit Society Limited vs Washington O. Okeyo (2002) KECA 284 (KLR), the Court of Appeal cited with approval holding in Localbail International Finance Ltd v Agroexport and Others (1986) 1All ER 901 thus;

> A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant had attempted to steal a march on the plaintiff. Moreover, before granting a mandatory interlocutory injunction the court had to feel a high degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction."

19. The respondent has claimed that the application is incompetent since its prayers are not anchored in the plaint. The plaint seeks for damages of various heads and disclosed amounts. The application seeks injunction to preserve assets in form of money which would obviously be usable in satisfying the resultant decree in case the matter is decided in favour of the plaintiff. This is a scenario which is allowed in law as long as the applicant satisfies conditions established for such application. The prayers for mandatory injunction seek to leverage the plaintiff's claim that the defendants are liable for part of the loans he took from the 2nd interested party. In this regard, I do not think that the respondent's argument that the prayers in the application are not anchored in the plaint is merited.

20. A mareva injunction is justified only where an applicant satisfactorily establishes that there is need to preserve assets belonging to the respondent in order to prevent an imminent dissipation of the assets in a manner that will frustrate satisfaction of a likely decree in favour of the applicant. In such application, the applicant does not lay claim to ownership or proprietary interest in the assets or property sought to be preserved. Their interest is limited to avoidance of having a paper decree incapable of being satisfied on account of the fact that the respondent's assets would not be traceable at the time of execution of the decree.

21. While considering a prayer for mareva injunction Honourable Justice A.A. Visram held in Maeri v Onduso & Another (2023) KEHC 21492 (KLR) that;

> 'The key point underlined above is that it is imperative, prior to the grant of a Mareva injunction, for the Applicant to produce evidence of a real and actual threat that assets will be disposed. Further, a successful Applicant must also demonstrate that the disposal of those assets are intended to defeat any judgment that would be entered in his favour.'

22. The plaintiff in this matter seeks in prayer 5 of his application to freeze money allegedly held by the 3rd interested party on account of the defendants. It is alleged that the money was proceeds of sale of the suit property. To get this order, the plaintiff has to convince this court that the money is truly being held for the defendants in the client's account of the 3rd interested party and that payment of the money to the defendants would render any decree passed in his favour in this matter nugatory. In addition, the plaintiff must proof that his case against the defendants is so clear that the chances of having the decree in his favour is the only likely outcome of the matter.

23. Other than averring that the suit property was sold to one Scolastica Wambui Kibathi for Kshs 40,000,000.00, the plaintiff has not produced any evidence that there is money held by the 3rd interested party on the account of the defendants. Actually, there is nothing to show that the 3rd interested party were the lawyers acting for the defendants in the alleged sale leave alone that the money was paid

through the 3rd interested party. The only paragraph in the supporting affidavit that mentions the 3rd interested party is paragraph 29 which states that there is real and imminent risk that the proceeds of sale of the suit property and indeed income from the sale of various properties belonging to the defendants and domiciled at the client account of the 3rd interested party will be wasted and/or divested to defeat the course of justice. This averment is not enough to establish that the 3rd party is holding any money for or on behalf of the defendants. The only evidence of sale is a search which shows that the suit property was transferred to Scolastica Wambui Kibathi on 21-06-2021.

24. Giving an order for preservation in the manner the plaintiff has couched its prayers would be in vain. The transaction is said to have been completed in June 2021. The plaintiff has confirmed that the 1st interested party was removed from the suit property after the sale of the property and in normal conveyance practice, the purchaser would not have taken possession without the purchase price having been paid. There is likelihood that the money was released to the vendor since this transaction was completed about four years ago. Court orders cannot be issued in vain. The onus of proving existence of the money was on the plaintiff which I find he has not discharged.

25. Even if the plaintiff were to prove that the 3rd interested party is holding the money, it will still be unjustifiable to issue the orders of preservation. The evidence available so far is that the suit property was transferred from the 3rd defendant to Scolastica Wambui Kibathi. The alleged agreement of joint investment was between the plaintiff and the 1st defendant. The 2nd defendant has denied ever entering into a joint venture with the plaintiff and the plaintiff has actually not deponed that he entered into any joint venture agreement with the 2nd defendant.

26. It has been deponed that the 2nd defendant has 12 directors and only the 1st defendant is alleged to have negotiated with the plaintiff in the joint venture. A single director or shareholder irrespective of the number of share she holds cannot bind the company without the consent, approval and permission of the other directors or the board of directors. It has been alleged that the 1st defendant's mother approved the arrangements but it has not been proved. Even if there was proof of the said approval, the 1st defendant and the mother had no authority to bind the company without a resolution of the board of directors.

27. The narrative that the 1st defendant was the beneficial owner of the suit property does not hold water. In the search produced by the plaintiff, there is no entry showing that the 1st defendant was ever registered owner of the suit property at any given time. In the circumstances, the only person who could enter into a legally binding agreement or arrangement in respect of the suit property was the 2nd defendant. The plaintiff is said to be an advocate of the High Court of Kenya of long standing and a high-ranking government official. It is expected that he knew the procedure, process and legal requirement in dealing with limited liability companies and the legal implication of entering into such arrangements without a written document and without involving the board of directors of the 2nd defendant. He depones in paragraph 9 of his supporting affidavit that he was aware before entering into the arrangements that, the 2nd defendant was the owner of the suit property yet he did not engage or consult it.

28. The argument that the suit property was willed to the 1st defendant does not make the plaintiff's case better. The suit property was owned by the company and the deceased could only bequeath shares in the company and not the suit property. However, since the family of the defendants has no issue with the distribution of the estate, that point is neither here nor there. In any event, there is no evidence that the suit property was ever transmitted to the 1st defendant. As rightly put by the 1st defendant, if the plaintiff had a claim over or interest in the suit property, he should have made it in the succession causes of the 1st defendant's parents.

29. The plaintiff has made ten prayers in the plaint. Reading thorough the prayers, one cannot fail to understand that the plaintiff's claims are couched in a manner as if the property was wholly owned by himself. For instance, prayer (a) asks for 100% of loss of rent earnings between 1-03-2021 and 31-05-2024. I have seen the receipts which the plaintiff claims to have been for costs of his investment in the suit property. None of the receipts issued by the county government in respect of the land is in the name of the plaintiff neither is there an endorsement or indication that the payments were made by the plaintiff. The receipts and correspondence in respect of expences which are in the plaintiff's name do not make reference to the suit property.

30. Prayer (c) of the plaint asks for Kshs 4,000,000.00 being the amount the plaintiff spent towards pre-project expences on the suit property. The suit property is said to have been sold at Kshs 40,000,000.00. The plaintiff has claimed that the property had a true value of Kshs 60,000,000.00. This means that his contribution as pleaded in the prayer was at most 7% of the value of the property. With that in mind, what justification would he have to claim 100% of the income from the property and that the 1st defendant contributes 50% of the loan? In any case, the plaintiff has not shown that the defendants are incapable of satisfying the decree in the event he succeeds in the main suit.

31. It is averred that the plaintiff is forum shopping as he has before filed suits in business premises rent tribunal and environment and land court at Thika in respect of right of use and occupation of the suit property. I have had a look at pleadings in Milimani High Court miscellaneous civil application number E389 of 2022 in which applicant (1st interested party) exhibited the documents filed in the tribunal case. The affidavits in those two cases were sworn by the plaintiff herein as a director of the 1st interested party. It is clear to me that in the business premises rent tribunal and the High Court matter which was later transferred to environment and land court in Thika, the 1st interested party claimed to be a head tenant in the suit premises. In these cases, the plaintiff herein never spoke of joint venture or agreement between the parties. The 1st interested party is admittedly owned by both the plaintiff and the 1st defendant. It has been deponed by the 1st defendant and not denied by the plaintiff that she had no hand in the institution of the case before the tribunal. As far as I can understand the documents, the person who was in the suit premises was the 1st interested party and not the plaintiff as the two are in law different entities.

32. Two of the prayers in the High Court cause were;

    4. The Honourable Court be pleased to issue an order directing the respondent to forthwith take up and make loan repayments due to Stanbic Bank loan account No. 0100027366282 in the amount of USD 4,000.00 per month with effect from 31st July 2021 until the commercial debt is extinguished as may be advised by the said Stanbic Bank Kenya Limited.

    5. This Honourable Court be pleased to issue an order to the managing partner of Dentons Hamilton Harrison and Mathews to pay the sum of USD 4,000.00 per month from respondent's salary and/or partnership drawings or other accounts to Stanbic Bank Kenya Limited loan account No. 01000273366262 until the conclusion of this dispute caused solely by the respondent acting in her personal and professional capacity.

33. The above is similar to and would have the same effect with prayers 2 and 3 of the application before me. Reading through the affidavit in support of the said application, the narrative therein was against the 1st and 2nd defendants in respect of the same suit property although the applicant claimed to have been a tenant and not a partner in investment. The parties have not been clear of the outcome of the miscellaneous application but the fact remains that the reliefs the plaintiff was seeking in the said application are the same as in this matter. This is violation of either the principle of sub judice or res

judicata. It is my finding that the application before me is an attempt by the applicant to obtain orders which have been denied in two other court processes. In my considered opinion, there cannot be a worse abuse of the court process than this.

34. Flowing from the above analysis, I am not convinced that the plaintiff has made out a prima fascie case with a probability of success. His case is clouded in controversy with so many grey areas and it cannot be said to be a clear case which deserves grant of mandatory or mareva injunction. The plaintiff has claimed liquidated damages which are easily ascertainable in the event proof is provided. In my analysis of the evidence before me, the plaintiff has failed to establish that the defendants are not able to compensate him in the event that the suit succeeds. He has leveraged his claim on a property in which he has not established his interest. He had no claim against the estates of the 1st defendant's parents or 2nd defendant's directors other than the 1st defendant and in these circumstances, I hold that the damages which he may suffer if the orders are not granted are not irreparable.

35. Having found that the plaintiff has failed to establish a prima fascie case with a probability of success and there being no satisfactory demonstration of likelihood of suffering irreparable damages, I do not have to delve into considering the balance of convenience.

36. As I conclude this ruling, I wish to observe that the applicant having sought discretionary orders, his conduct in the matter should not escape the scrutiny of the court. It is trite principle of law that he who comes to equity must not only come with clean hands but must also do equity. The conduct of the plaintiff, as narrated by the 1st defendant which I have no reason to doubt, would describe a former spouse who has so much hatred and dislike for his former in-laws that he will hang onto any straw available to prove a chauvinistic point. The estate of James Karani Gitao was distributed without a hitch and the family has no dispute over the same but the plaintiff seems to be ready to drive a wedge between the family by bringing up allegations of the 1st defendant having forged the deceased's Will yet the beneficiaries of the estate have not raised a finger about it. The plaintiff's acts of writing letters of complaints to offices of the 1st defendant's employers, professional regulators, church leadership and police in order to ensure that his former spouse does not have peace is distasteful, disrespectful and heartless and this court will not be used as a conveyor belt for such frustrations, malice and bitterness.

37. In conclusion, the application dated 6th June 2024 lacks merits and the same is hereby dismissed with costs to the defendants and the interested parties.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 24TH DAY OF JANUARY 2025.

B.M. MUSYOKI

JUDGE OF THE HIGH COURT.

Ruling delivered in presence of Mr. Mumia for the plaintiff and Mr. Mugambi for the defendants and in absence of the interested parties.