Kirima v Mohoni & 2 others (Sued in Their Representative Capacity as the Officials of the Kenya Institute of Bankers); Gachora & 2 others (Sued in Their Representative Capacity as Officials of the Kenya Bankers Association) (Interested Party) (Civil Case E038 of 2025) [2025] KEHC 11421 (KLR) (Civ) (31 July 2025) (Ruling)

Neutral citation: [2025] KEHC 11421 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL CASE E038 OF 2025

JN MULWA, J

JULY 31, 2025

BETWEEN

DISHON KIRIMA ..... PLAINTIFF

AND

JOHN RIOBA MOHONI, AS CHAIRPERSON JOHN MWIKA, AS TREASURER; AND JULIUS ALEGO, AS SECRETARY (SUED IN THEIR REPRESENTATIVE CAPACITY AS THE OFFICIALS OF THE KENYA INSTITUTE OF BANKERS) ..... DEFENDANT

AND

JOHN GACHORA AS CHAIRPERSON BETTY KORIR AS VICE CHAIRPERSON; AND RAIMOND MOLENJE AS SECRETARY (SUED IN THEIR REPRESENTATIVE CAPACITY AS OFFICIALS OF THE KENYA BANKERS ASSOCIATION) ..... INTERESTED PARTY

RULING

1. For determination is the motion filed by Dishon Kirima (hereafter the Plaintiff/Applicant) dated 17/02/2025 against John Rioba, John Mwika & Julius Alego (sued in their representative capacity and officials of) The Kenya Institute of Bankers (hereafter the Defendant/Respondent) and John Gachora, Betty Korir & Raimond Molenje (sued in their representative capacity and officials of) The Kenya Bankers Association (hereafter the Interested Party) seeking inter alia -

    a. Spent

    b. Spent.

c. That pending the hearing and determination of this suit the Respondent either by themselves, their servants, agents and otherwise be and are restrained from transferring assets to the interested Party, holding or Conducting the Annual General Meeting (AGM) to be held virtually or any subsequent Special General Meeting (SGM).

d. Spent.

e. That pending the hearing and determination of this suit the Interested Party be and are hereby restrained from taking over the Respondent institute until the Plaintiff is paid in full or an arrangement for payment is in place.

f. That cost of the motion be in the cause.

2. The motion is brought pursuant to Orders 40 Rule 1, Order 51 Rule 1 of the Civil Procedure Rules (CPR) and Section 1A, 1B & 3A of the *Civil Procedure Act* (CPA) on grounds on the face of the motion amplified by the supporting affidavit deposed by the Applicant. The gist of his deposition is that the Respondent through the Chairperson has without notice to him as creditor issued a notice to dissolve the Respondent. That he is a fellow of the Respondent, a consultant and decree-holder having successfully sued the Respondent in Nairobi HCCC No. E312/2021.

3. The Applicant goes on to depose that the Respondent sought stay of execution for 30 days to enable it to organize the settlement of the judgment together with costs amounting to Kshs. 4,608,410/- however the Respondent has been taking him in circles, as they plan to dissolve it without paying.

4. It further posted that the Respondent planned to hold its AGM and SGM on 12/03/2025 and in the said notice there is no agenda addressing any liabilities that include the judgment in Nairobi HCCC No. E312/2021 whereas in the said agenda it can be garnered that the Respondent is being taken over by the Interested Party through private arrangement. In conclusion he states that the instant motion has been filed without undue delay whereas there is imminent danger that the Respondent will be dissolved thereby denying him justice

5. The Respondent opposes the motion by way of grounds of opposition dated 14/03/2025 and a replying affidavit deposed by John Robia on an even date. In the said grounds the Respondent takes issue with the motion on grounds that application is patently bad in law, is frivolous and an abuse of the process of the Court as the subject matter of the suit relates to another suit in this court being Nairobi HCCC No. E312/2021 in which the Applicant can articulate his payment concerns (if any); that the Applicant ought to apply for the payment of the decretal amount by way of execution of the judgment and decree in Nairobi HCCC No. E312/2021 which decree is yet to issue; and that one of the prayers in the application has been overtaken by events as the AGM/SGM sought to be injuncted against was held on the 12/03/2025 as scheduled.

6. In his response, John Robia confirms that a resolution was passed on 12/03/2025 to dissolve the Respondent. He assails the Applicant's allegation of having been taken in circles meanwhile states that overtures had been made however, it is the Applicant who failed to instruct counsel on an agreement or consent to be recorded in the matter.

7. It is averred that the Applicant being a member of the Respondent was duly served with a notice for the AGM/SGM whereas he failed to take up the opportunity by issuing a notice to the Respondent of his intention to raise his liabilities concern and seek a resolution on the same during the AGM/SGM. He concludes that despite dissolution of the Respondent, its residual assets would be transferred to the Interested Party, to wit, the Respondent will settle its liabilities and only transfer any residual assets therefore the motion ought to be dismissed with costs.

8. Directions were taken on disposal of the motion by way of written submissions. Only the Applicant complied.

9. The Interested Party did not participate in the instant proceedings. That said having considered the material canvassed in respect of the motion, the Court considers the following as the issues falling for determination pending hearing and determination - :

    a. Whether the application has met the threshold for grant of an order restraining the Respondent from conducting its AGM or SGM on 12/03/2025 pending determination of the suit?

    b. Whether the application has met the threshold for grant of an order restraining the Interested Party from taking over the Respondent until the Applicant is paid in full or an arrangement for payment is in place, pending determination of the suit?

    c. Who ought to bear the costs of the motion?

10. The Court proposes to address the first two (2) issues contemporaneously. As earlier noted, alongside a replying affidavit, the Respondent filed grounds of objection in response to the application. While Order 51 Rule 14 (1) of the CPR only recognizes a preliminary objection (PO), replying affidavit and statement of grounds of opposition as mode to wit a party may oppose an application. Nevertheless, it has since been settled in the celebrated case of Mukisa Biscuit and recently the Court of Appeal in Blue Thaitian SRL (Owners of the Motor Yacht 'Sea Jaguar') v Alpha Logistics Services (EPZ) Limited (Civil Appeal (Application) E012 of 2020) [2022] KECA 1240 (KLR) wherein it was respectively observed that the effect of filing a PO or grounds of opposition in response to an application would confine a party to issues of law and legal arguments only.

11. That said, in presenting the instant motion, the Applicant has relied on among others provisions of the CPA, Section 3A which specifically reserves "the inherent power of the court "to make such orders as may be necessary for ends of justice or to prevent abuse of the process of the court." This Court's inherent powers was judiciously addressed by the Court of Appeal in Rose Njoki King'au & Another v Shaba Trustees Limited & Another [2018] eKLR and requires no restatement. Alongside the above, the Applicant has saliently relied on Order 40 Rule 1 of the CPR that concerns the granting of temporary injunctions and or interlocutory orders. The principles governing the grant of interlocutory injunctions, was settled in the celebrated case of Giella v Cassman Brown & Co. Ltd [1973] EA 358. In the latter case, the principles for the grant of injunctions were settled to be the tripartite-:

    a. Establishing a case at a prima facie level.

    b. Demonstrating irreparable injury if a temporary injunction is not granted and;

    c. If in any doubts as to (b) by showing that the balance of convenience is in one's favour.

12. Further the Court of Appeal in Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR restated the principles governing the grant of interlocutory injunctions as enunciated in Giella case and observed that the role of the Judge dealing with an application for interlocutory injunction is merely to consider whether the application has been brought within the said principles, and in addition, the Court stated that the three (3) conditions apply separately as distinct and logical hurdles to be surmounted sequentially by the Applicant, thus an Applicant who establishes a prima facie case must further establish irreparable injury, being injury, for which damages recoverable cannot be an adequate remedy; And where the Court is in doubt as to the adequacy of damages in compensating such injury, the Court will consider the balance of convenience; and finally, where no prima facie case is established, the Court need not investigate the question of irreparable loss or balance of convenience.

13. As to what constitutes a prima facie case with a probability of success, is one that a Court would conclude upon material presented before it, that there exists a right that has been violated or infringed by the opposite party that calls for explanation as held in the Mrao v. First American Bank of Kenya Ltd & 2 others [2003] eKLR. The aforestated decisions have been reaffirmed and applied by superior Courts in countless decisions.

14. Thus, with the above in reserve, at the outset, among the orders sought was one seeking to restrain the Respondent from conducting its AGM/SGM on 12/03/2025 pending determination of the suit. Vide its response, through (Annexure JR1), the Respondent has since informed the Court that the SGM proposed for 12/03/2025 has since been held with a resolution being arrived at. The Applicant has not challenged this position nor hinted to the fact that the purported AGM/SGM scheduled for 12/03/2025 failed to take off. As is, the relief sought in light of the above evidence would appear to have been overtaken by events and or is moot in the circumstances.

15. As to whether the Court ought to restrain the Interested Party from taking over the Respondent until the Applicant is paid in full or an agreement for payment arrived at, there is no disputation that Applicant and Respondent were litigating in another matter before this Court vide Nairobi HCCC No. E312/2021 wherein judgment was entered in favour of the Applicant as against the Respondent to the tune of Kshs. 2,000,000/- plus costs of the suit and interest thereon. (Annexure DK-2).

16. The Respondent has argued that the Applicant can articulate his issues in Nairobi HCCC No. E312/2021 rather than file the instant suit therefore the same amounts to an abuse of the Court process. While it appears that parties were negotiating on settlement of the sums awarded in Nairobi HCCC No. E312/2021 (Annexure JR2) it seems that no formal settlement has since been reached on the matter.

17. That said, going by (Annexure JR1) the Respondent seems to have equally been dissolved by dint of Chapter 15 of its Constitution, to wit, it was resolved that its various residual assets would be transferred to the Kenya Bankers Association (KBA) Training Institute. There is no indication from the said minutes as to who would take up any of the Respondent's residual liability, going by (Annexure JR2) which is an acknowledgement that the Respondent was indebted to the Applicant.

18. Therefore, at this juncture, the Court must ask itself whether it would be efficacious to restrain the Interested Party from taking over the Respondent in light of the material before this Court and exhortation in Nguruman (supra) regarding the establishment of a prima facie case wherein the Court observed that-;

> Recently, this court in Mrao Ltd. V. First American Bank of Kenya Ltd & 2 others [2003] KLR 125 fashioned a definition for "prima facie case" in civil cases in the following words:
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> "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."
>
> We adopt that definition save to add the following conditions by way of explaining it. The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is 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. We

reiterate that in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The applicant need not establish title it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. 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."

19. Here, I reasonably believe that granting the order as sought by the Applicant would be moot given the events that have since transpired as regards the Respondent's dissolution. Further, as rightly argued by the Respondent rather than initiate execution proceedings as against the Respondent having successfully secured a judgment, the Applicant opted to file the instant suit notwithstanding the claim canvassed in the suit.

20. In Mrao Ltd (supra) the Court emphasized that it was not merely sufficient to raise issues but to adduce evidence showing infringement of a right sufficient to call for an explanation or rebuttal from the opposite party and that the standard of proof required is higher than an arguable case. Further in Nguruman (supra) it was reiterated that where no prima facie case is established, the Court need not inquire into the consideration of irreparable damage or balance of convenience.

21. Ultimately, the totality of facts point toward the inevitability that no prima facie case has been advanced by the Applicant. The Court is hamstrung upon a review of the material placed before to isolate an infringement of a right, and the probability of success of the applicant's case upon trial.

22. The Applicant's motion is dismissed with costs.

Orders accordingly.

DELIVERED DATED AND SIGNED AT NAIROBI THIS 31ST DAY OF JULY, 2025

.....

JANET MULWA.

JUDGE