



Exclusive Living East Africa Limited & another v Bulimu; Exclusive Living East Africa Limited & 3 others (Defendant to the Counterclaim) (Commercial Case E453 of 2020) [2025] KEHC 12478 (KLR) (Commercial and Tax) (1 September 2025) (Judgment)

Neutral citation: [2025] KEHC 12478 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E453 OF 2020
JWW MONG'ARE, J
SEPTEMBER 1, 2025**

BETWEEN

EXCLUSIVE LIVING EAST AFRICA LIMITED 1ST PLAINTIFF

MARC OLIVER STRACK 2ND PLAINTIFF

AND

ANN MIDEVA BULIMU DEFENDANT

AND

EXCLUSIVE LIVING EAST AFRICA LIMITED DEFENDANT TO THE COUNTERCLAIM

MARC OLIVER STRACK DEFENDANT TO THE COUNTERCLAIM

REGISTRAR OF COMPANIES DEFENDANT TO THE COUNTERCLAIM

ATTORNEY GENERAL DEFENDANT TO THE COUNTERCLAIM

JUDGMENT

Introduction and Background

1. This matter concerns a dispute over the shareholding, directorship and management of the 1st Plaintiff (“the Company”) which owns Rivulet Residences. The Company was incorporated on 20th May 2013, with the 2nd Plaintiff (“MARC”) and AJ as the original, equal shareholders and directors. The Company acquired L.R. No. 209/2389/16 for Kshs.39,000,000.00/= and constructed Rivulet Residences, a 57-unit apartment complex. Through their Amended Plaint dated 17th March 2023, Plaintiffs claim that the construction was financed by a 5,000,000 Euro credit line from AJ’s parents.



- They claim that in 2018, they discovered that the Defendant (“Ann”), had fraudulently altered the Company’s structure by increasing share capital, allotting herself 1,900 shares, and appointing herself and one FNM as a director and secretary, respectively.
2. The Plaintiffs complained to the 3rd Defendant to the counterclaim (“the Registrar”) who, on 28th July, 2020, expunged these changes from the Register, declaring them illegal, fraudulent, and irregular due to lack of proper notice and quorum at the alleged meeting of 1st July, 2015, where the changes were supposedly sanctioned. The Plaintiffs aver that despite the Registrar’s decision, Ann continues to possess and control the Company’s assets, including Rivulet Residences, collecting an alleged Kshs.3,345,000.00/= in monthly rent since January 2019.
 3. The Plaintiffs seek inter alia, a permanent injunction to restrain Ann from acting as a director, shareholder, or representative of the Company, mandatory injunctions for surrender of assets, orders for Ann to restore the Company premises, prohibition from interfering with rent collection, rendering an account and refund of collected rent, general damages for fraud, exemplary/punitive damages for breaching Registrar’s orders, an eviction order for Ann to vacate Company premises, and a refund of all rent collected from Rivulet Residences since January 2019. Ann responded to the suit through a statement of Defence and counterclaim dated 18th April 2021 and statement of Defence dated 18th August 2023 in response to the Amended Plaint. Ann claims to have founded a non-governmental organization, Kenya Young Greens, focusing on environmental and social issues. She states she met MARC in 2009, and their relationship developed over time, with him moving to Kenya in 2012, assisted by Ann in seeking employment. Ann asserts that her interest in real estate, shared with a friend from UNDP, inspired MARC’s interest in the sector.
 4. Ann claims that along with Carolyne Nekesa, scouted for the land (L.R. No. 209/2389/16) and played a role in its Kshs.39,000,000.00/= purchase. She states CAROLYNE NEKESA introduced the lawyer who assisted in incorporating the Company and that she and CAROLYNE NEKESA allegedly paid the initial deposit for the land and that MARC purportedly held shares in the Company on behalf of himself and Ann due to her NGO position and their relationship. Ann asserts that she engaged university students for apartment design, sourced professionals (architects, engineers, project manager, quantity surveyor), applied for licenses, including approvals for extra floors, supervised construction, paid workers, and co-signed cheques and documents with MARC. She states the project was financed by off-plan sales, with AJ providing the finishes. Ann states some units were sold off-plan, and the remaining units were sold to CM after completion.
 5. Ann alleges that MARC moved out after she questioned his financial impropriety and infidelity. She was subsequently informed that AJ complained to the Registrar, claiming she was not a shareholder or director and seeking to set aside resolutions that allotted her shares and appointed her as a director. She was also removed as a signatory to the Company’s bank accounts. Ann views these actions as a scheme to remove her, as MARC and his associate had achieved their goals without cost or effort.
 6. Ann highlights the present suit as an attempt to remove her from MARC’s life and the Company, claiming she is masquerading as a director, possesses company assets, and collects rent belonging to the Company. She mentions filing a case (HCFOS/013/20) to thwart attempts to remove her from their matrimonial home and another case (Milimani Children Case No. E831/20) seeking judgment for their minor child’s education and upkeep. Ann states that she also reported MARC’s alleged financial improprieties to the Directorate of Criminal Investigations, leading to a constitutional petition (MILIMANI HCPET/355 of 2020) by MARC, which was dismissed. The Defendant’s counterclaim seeks to set aside the Registrars’ ruling dated 28th July 2020, and restoring the status quo that prevailed before the ruling and that her shareholding and directorship in the Company be reinstated.



7. When the matter was set down for hearing, MARC testified on behalf of the Plaintiffs (PW 1) where he adopted his witness statements dated 3rd November 2020 and 31st May 2023 as his evidence. He also produced the Lists and Bundles of Documents dated 21st November 2023 and 3rd November 2020 (PExhibit 1-30). On her part, Ann testified on her own behalf (DW 1) where she relied on her witness statement dated 18th September 2023 and produced the List and Bundle of Documents dated 6th June 2023 (DExhibit 1-47). She also called CAROLYNE NEKESA who testified as DW 2 where she relied on her witness statement dated 18th September 2023 and PHILLIP OKEYO OYOO who relied on his witness statement dated 18th September 2023. After the hearing, the parties were directed to file written submissions which are on record and since they mirror the positions of the parties highlighted above, I will not highlight the same but make relevant references in my analysis and determination below.

Analysis and Determination

8. As these are civil proceedings, it should not be lost that the court's determination is on a balance of probabilities and is guided by the principle that he who alleges must prove. Lord Denning J., in *Miller v Minister Of Pensions* [1947]2 All ER 372 discussed the burden of proof and he stated as follows:

“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: ‘we think it more probable than not’, the burden is discharged, but, if the probabilities are equal, it is not. Thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties' explanations are equally (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained.”

9. The aforementioned position has now been espoused by our superior courts and finds statutory comfort in sections 107 and 108 of the *Evidence Act* (Chapter 80 of the Laws of Kenya) which provide as follows:

107. Burden of proof.

- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. Incidence of burden.

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

(Also see *Ignatius Makau Mutisya v Reuben Musyoki Muli* [2015] KECA 612 (KLR))

10. From the parties' submissions, I find that the following are the abridged issues for the court's determination:
- i. Whether the court has jurisdiction to hear and determine this suit
 - ii. Whether MARC should be struck off the suit



- iii. Whether judgment should be entered against the Registrar for failing to enter appearance and/or failure to defend the suit by way of counterclaim
- iv. Whether the Registrar correctly used section 862 of the *Companies Act* to expunge the changes made on 1st July, 2015.
- v. Whether Ann has a legitimate claim to a stake in the Company.
- vi. Whether Ann's Counterclaim is merited.
- vii. Whether the Plaintiffs are entitled to the orders sought.
- viii. Who bears the costs of the Suit.

Jurisdiction of the court

11. I note that Ann has posed the question as to whether the court has jurisdiction to hear and determine this suit to which she answers in the affirmative. None of the parties has challenged the court's jurisdiction and I am in agreement with Ann's submissions that disputes arising from the operations of the *Companies Act* and complaints against the Registrar in the exercise of their functions under the Act are to be determined by this court (see Republic v Registrar of Companies & 2 others; Waterfront Outlet Limited (C.147966) (Interested Party); Waterfront Outlets Limited (CPR/2015/214503) (Exparte) [2023] KEHC 227 (KLR)). I find the court is therefore clothed with the requisite jurisdiction to hear and determine the Plaintiffs' claim as well as Ann's counterclaim against the Plaintiffs and the Registrar.

Striking off MARC from the suit

12. Ann submits that MARC is not a necessary party in these proceedings since the Company is a separate and independent legal entity with powers to sue and be sued in its name and that all reliefs sought against Ann are sought in favour of the Company and none touches on MARC as an individual. However, I note that Ann raised this issue before in her preliminary objection dated 17th November 2020 stating that MARC lacks the capacity to institute and or co prosecute the instant suit and, on that ground, alone this suit ought to be struck of for misjoinder of parties. Further, that the suit as drawn and pleaded lacks clarity on who the Plaintiff is and their ability to co prosecute this the suit. The court considered this objection and made a finding in its ruling of 19th May 2022 dismissing it. The court also considered a similar argument in Ann's application dated 12th September 2024 which was dismissed through the ruling of 27th January 2025. As the court has pronounced itself on the issue and since there is no pending appeal on the same, Ann is estopped from raising the same issue in the main suit.

Judgment against the Registrar for non-appearance and no-filing of a Defence or counterclaim

13. Ann submits that the Registrar was properly served with the Counterclaim but despite entering appearance and filing a statement Defence, they did not serve the same upon Ann and they did not participate in the hearing of the suit despite service. As such, Ann submits that the court should strike out the Registrar's memorandum of appearance and the Defence for want of service as provided by Order 10 Rule 3 of the Civil Procedure Rules which provides that "Where a Defendant fails to serve either the memorandum of appearance or Defence within the prescribed time, the court may on its own motion or on application by the plaintiff, strike out the Memorandum of Appearance or the Defence as the case may be and make such order as it deems fit in the circumstances". Further, Ann submits that judgment ought to be entered against the Registrar for want of Appearance and Defence and failure to appear at the hearing of the suit.



14. In *Job Kilach v Nation Media Group & 2 others* [2006] KECA 224 (KLR), the Court of Appeal held that “Before the grant of summary judgment, the court must satisfy itself that there are no triable issues raised by the Defendant, either in his statement of Defence or in the affidavit in opposition to the application for summary judgment or in any other manner”. I note that Ann did not apply for entry of judgment once it was apparent that the Registrar had made a late filing of its Defence which I interpret as her acquiescence to the late filing and allowing the court to proceed with the late defence. As Ann is seeking summary judgment after evidence has been presented at the trial, I think it will only be fair if the court can evaluate the evidence and pleadings to determine whether Ann is entitled to the reliefs sought in her counterclaim. Let me also state that I have not lost sight of the effect of a Defendant who files a Defence but fails to produce any evidence at the hearing. In any case, judgment is based on the merits after the hearing and Ann, as the plaintiff in her counterclaim must prove her case on a balance of probabilities, as the burden of proof remains with her (see *Motex Knitwear Limited v Gopitex Knitwear Mills Limited* [2009] KEHC 4017 (KLR)). and *Karugi & another v Kabiya & 3 others* [1983] KECA 38 (KLR). Ann’s request for summary judgment is therefore denied.

Correctness of the Registrar’s decision expunging the changes of 1st July 2015

15. It is common ground that the Registrar’s ruling of 28th July 2020, expunged the changes made to the Company’s records on 1st July 2015, which included the allotment of shares to Ann and her appointment as a director. The Plaintiffs argue that the Registrar’s actions were justified and within the scope of the *Companies Act* specifically section 862, which deals with rectification of the company register. Ann on the other hand, has challenged this ruling in her Defence and counterclaim terming it a “sham” and that the outcome had been “pre-determined” and that there was a miscarriage of justice. She avers that the Registrar never considered her responses and that of her advocate and FNM and that the decision was biased against her. In its decision, on the issue whether the meeting held on 1st July, 2015 was authorized, quorate and properly convened, the Registrar found that there was no proper notice was issued and or authorized to be issued to convene the meeting. Further, the Registrar noted from the responses issued by all parties that the two members of the Company in issue were not present at the purported meeting either personally or by proxy. Thus, the said meeting was unauthorized and void ab initio.
16. On the issue whether the appointment of FNM passed through a resolution of meeting held on 1st July, 2015 was factual and authorized, the Registrar found that the appointment of FNM as Company Secretary to the Company was improper and void given that there was no resolution passed by the members of the Company and that her basis of appointment was because “...we were retained by the firm of Ms [ANK] to offer secretarial services to its firm’s clients, one of whom was Exclusive Living EA Limited.” The Registrar held that the firm of ANK lacked such locus to make the said appointment given that they are not members of the Company. On the issue whether the appointment of Ann as a director of the Company and allotment of 1,900 shares was factual and authorized, the Registrar found that the resolutions passed effecting the appointment of Ann as a director of the Company, the increase of the Company’s share capital and the subsequent allotment of shares are null and void.
17. For the above reasons afforded, the Registrar found reason to invoke the provisions of section 862 of the *Companies Act* and notify the Company that from the date of the ruling, the purported changes together with all the accompanying documents that led to change of directorship, appointment of company secretary, alteration of the Company’s share capital and allotment of shares had been expunged from the register. The Registrar then held that without prejudice to the foregoing, as per the *Companies Act* and the Memorandum & Articles of Associations, the Company reserved the authority to alter the structure of the Company as it wills and it urged that the Company adheres to the provisions



contained in law as it seeks to run its affairs and further invite any correspondence with regard to the issue at hand.

18. When circumstances of the impugned meeting of 1st July, 2015 were put before Ann in her testimony, she admitted that AJ was not in that meeting even though the minutes of the meeting indicated that he was present. She further admitted that no notice was issued to the shareholders to attend the meeting and that according to copies of MARC's passport, there is an entry stamp dated 2nd July 2015 indicating that MARC was not in the country on 1st July 2015 when the meeting took place. Ann also confirmed that the complaints made by AJ and MARC were in respect of changes made to the Company's shareholding and directorship and that their complaint was in respect of the absence of notices before changes were made.
19. Going through Ann's evidence above, it is clear that it is consistent with the Registrar's findings that no notices were issued to AJ and MARC as the shareholders of the Company and that the resolution to effect the changes in the Company were a nullity. As the shareholders of the Company were not issued with notices and they were not present at the said meeting, I find that the Registrar was correct to find that the impugned meeting was not authorized, neither was it quorate nor properly convened. Further, whereas Ann claims that the Registrar only considered the position of MARC and not hers, the decision clearly captures Ann's responses together with others and that the Registrar makes reference to the same in its decision. Ann also confirmed that she received a letter from the Registrar inviting her to respond to the allegations of irregular changes in the Company and that she indeed responded to the same and stated that that she was aware that the Registrar rendered a decision on the complaint on 28th July 2020. It therefore follows that the issue of unfairness or bias by the Registrar does not arise.
20. Section 862(1) of the *Companies Act* provides that "On receiving an application made in accordance with this section, the Registrar shall remove from the Register an entry relating to a company that the Registrar is satisfied is of a kind that—(a) derives from anything invalid or ineffective or that was done without the authority of the company; or (b) is factually inaccurate, or is derived from something that is factually inaccurate or is forged." As the Registrar correctly determined that the changes effected on the Company were done without authority and that it was factually incorrect that MARC and AJ were present in the impugned meeting of 1st July 2015, I find that it was proper for the Registrar to remove the said entries in the Company arising out of resolutions of the said meeting. I therefore find that the Registrar properly invoked the provisions of section 862 of the *Companies Act* to expunge the changes done in the Company pursuant to the resolutions dated 1st July 2015

Ann's stake in the Company

21. Ann stated that she is a member of the Company in that the shares held by MARC belong to her, that she had been involved in the Company's incorporation and that she had monetarily contributed to its formation and growth. However, in her testimony, Ann admitted that she was neither a shareholder at the time of incorporation nor at the time of her filing of the counterclaim. She was also not able to confirm that she enjoined the services of JC, an advocate, to fast track the registration process as she could not produce any evidence of such an engagement. She was not able to produce any evidence of payment of legal fees of registration costs. On her financial contribution, even though she stated to have paid some Kshs.9,000,000.00-part payment for the property L.R. No. 209/2389/16, she admitted that she did not have any evidence of such payment. DW 2 also stated that in as much as payments for the property were done in two tranches, she does not know who made the payments in as much as she negotiated all the terms of the sale. DW 2 stated that she was the one who paid for the incorporation of the Company but that it was MARC who was to reimburse her. DW 2 also confirmed that Ann was not a director at the time of incorporation.



22. From the evidence above, it is my finding that Ann has not identified and demonstrated a legal and identifiable stake in the Company as she is not its director or shareholder and she did not monetarily contribute to its formation or that of its assets, including property L.R. No. 209/2389/16 where Rivulet Residences is situated.

Merit of Ann's counterclaim

23. Based on my findings above that the Registrar's decision was proper and that the changes in the Company were a nullity, it follows that Ann's counterclaim seeking, among other things, the setting aside of the Registrar's ruling and the restoration of her alleged shareholding and directorship cannot be granted. The same is hereby dismissed forthwith.

Merit of the Plaintiffs' suit

24. On the flipside, I hold that my findings are favourable to the Plaintiffs' case. As stated, the Plaintiffs seek a permanent injunction to restrain Ann from acting as a director, shareholder, or representative of the Company, mandatory injunctions for surrender of assets, orders for Ann to restore the Company premises, prohibition from interfering with rent collection, rendering an account and refund of collected rent, general damages for fraud, exemplary/punitive damages for breaching Registrar's orders, an eviction order for Ann to vacate Company premises, and a refund of all rent collected from Rivulet Residences since January 2019. As Ann has never been a director or shareholder of the Company and since the Registrar's decision has never been set aside since 2020, I find that she has no say in the Company's management or its assets.
25. The Plaintiffs have also demonstrated their stake in Rivulet Residences and other assets owned by the Company which are now being possessed by Ann, which should not be the case. Ann also stated that 30 units of Rivulet Residences had been sold although she only produced 9 sale agreements and she did not produce evidence of the other 21 units she claims have been sold. This court is satisfied that she needs to account to the company for these units. Further, the Plaintiffs were able to produce uncontroverted evidence that rent from the residences were being paid by the tenants to Ann's sister's MPESA number. This also needs to be accounted for and the amounts collected refunded to the Company which it appears has already been tabulated by the Plaintiffs as Kshs.3,345,000.00/= per month from January,2019.
26. On exemplary damages, the Plaintiffs submit that the court should award a sum of Kshs.5,000,000.00/= as Ann's actions were oppressive, arbitrary and so glaring unfair to the Plaintiffs. Exemplary damages, also known as punitive damages, are awarded in Kenya to punish and deter egregious conduct, rather than to compensate for loss. They are rare and typically limited to specific circumstances including i)in cases of oppressive, arbitrary or unconstitutional action by the servants of the government, ii) cases in which the Defendant's conduct has been calculated to make a profit for himself which may well exceed the compensation payable to the plaintiff and iii) where exemplary damages are expressly authorized by statute (see (see *Rookes v Barnard* [1964] AC 1129 and *Godfrey Julius Ndumba Mbogori & another v Nairobi City County* [2018] KECA 702 (KLR))
27. As it has been demonstrated that there was unauthorized collection of rent by Ann and that this conduct conferred a personal benefit to her to the detriment of the Company, I find that this award is allowable. However, as no fixed formula exists due to the discretionary nature of such awards and considering the period between the Registrar's decision and when Ann has been collecting rent for herself, I find that an award of Kshs. 5,000,000.00/=, as sought by the Plaintiff, as exemplary damages would be appropriate in the circumstances.



28. Further as the Plaintiffs have been successful in their suit, I find that they are entitled to costs of prosecuting the suit and defending the counterclaim.

Conclusion and Disposition

29. For the above reasons, I now issue the following final orders:

1. The Plaintiffs' suit is allowed in the following terms;-
 - a. An order of permanent injunction be and is hereby issued restraining the Defendant by herself, agents, servants or otherwise howsoever from masquerading as a director, shareholder and or representative of the 1st Plaintiff.
 - b. A mandatory injunction be and is hereby issued compelling the Defendant to surrender all of the 1st Plaintiff's assets in her possession.
 - c. An order of eviction be and is hereby issued directing the Defendant, her kin, agents and/ or servants to immediately vacate the 1st Plaintiff's offices and the 1st Plaintiff's premises known as Rivulet Residences situated on L.R. No. 209/2389/16 and not later than Fourteen (14) days from the date of this Judgment.
 - d. The Eviction process of the 1st Defendant (Ann) to be supervised by the Inspector General of the National Police Service through the Officer Commanding Pangani Police Station, Nairobi or any other Police Station so identified by the Inspector General of the National Police Service.
2. The Defendant be and is hereby directed to leave the 1st Plaintiff's offices and Rivulet Residences in the good condition obtaining prior to her illegal take over and to restore all the machinery, fittings and assets taken from the said Rivulet Residences and to surrender any other assets of the 1st Plaintiff in her possession.
3. An order be and is hereby issued prohibiting the Defendant whether by herself, agents and/ or servants from interfering, taking over, collecting rent or any other levies from Rivulet Residences situated on L.R. No. 209/2389/16 forthwith.
4. An order be and is hereby issued directing the Defendant to refund the Company the rent collected from Rivulet Residences at Kshs.3,345,000.00/= per month from January 2019 to the date of judgment.
5. The Plaintiffs are awarded the sum of Kshs.5,000,000.00/= as Exemplary Damages.
6. The Plaintiffs are awarded costs of the suit and counterclaim.
7. The Defendant's counterclaim is dismissed in its entirety.

DATED SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 1ST DAY OF SEPTEMBER 2025

.....
J.W.W. MONGARE

JUDGE

In the presence of

1. Mr. Kiplagat for the Plaintiff



2. Mr. Kariuki for the Defendants

3. Amos- Court Assistant

