Malewa Raching Company Limited v Nganga & 146 others (Civil Case E007 of 2021) [2024] KEHC 2780 (KLR) (19 March 2024) (Ruling)

Neutral citation: [2024] KEHC 2780 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYAHURURU

CIVIL CASE E007 OF 2021

CM KARIUKI, J

MARCH 19, 2024

BETWEEN

MALEWA RACHING COMPANY LIMITED ..... PLAINTIFF

AND

JOSEPH NYUTU NGANGA & 146 OTHERS ..... DEFENDANT

RULING

1. By Notice of Motion dated 24/11/2021. The Applicants sought orders as follows:

    i. That the application herein be certified as urgent and the same be heard ex-parte and the service hereof be dispensed in the first instance.

    ii. That pending the hearing and determination of this application inter-parties the Honourable Court be pleased to issue a temporary injunction restraining the respondents herein jointly and severally from conducting the meeting scheduled of the 24th or 25th November 2021 at Kamahia/Cereal Board Trading Centre in Kipipiri Sub-county, Nyandarua County

    iii. That the Sub-County Police Commander Kipipiri Sub -County does ensure the compliance of this court order:

    iv. That the costs of this Application be in the cause.

    v. That pending the hearing and determination of this suit the honourable court be pleased to issue a temporary injunction restraining the respondents herein joint and severally from conducting the meeting scheduled for the 24th or 25th November 2021 at Kamahia/Cereal Board Trading Centre in Kipipiri Sub-County, Nyandarua County.

    vi. That pending the hearing and determination of the suit herein the Honourable Court be pleased to issue a temporary injunction restraining the Respondents herein jointly and severally from calling for and conducting any meeting of the Applicant company herein.

2. It is supported by grounds on its face namely:

   i. That this matter came up in Court on the 15th November, 2021 for directions, that subsequently the interim orders on record barring and injuncting the Respondents from calling and holding the Plaintiff's company meeting scheduled for 23rd October, 2021 were held to be overtaken by events.

   ii. That the Respondents herein vide a notice dated 30th August, 2021 calling for a meeting of the applicants' special general meeting that was to be held on the 24th September, 2021.

   iii. The Honourable Court vide an order dated 23rd September, 2021 restrained by wav of an injunction the Respondents herein from holding the said meeting pending the hearing and determination of the Application dated 20th September, 2021.

   iv. That the said suit came up for hearing on 4th October, 2021, 1st November, 2021 and 15th November, 2021 and all occasions the same did not proceed since the Respondents have not respondent to the Application dated 20th September, 2021 and the suit herein.

   v. That indeed on 15th November, 2021, the Respondents through their counsel on record were categorical that the Application is overtaken by event, but was cautious of stating that their delay is the cause for the said sad fate.

   vi. On 16th November, 2021 the Respondents issued a Notice. calling for the Applicant company's Extra Ordinary General Meeting to be held on 22nd November, 2021 al Kamahia Shopping Centre. in total disregard of the instant suit challenging their capacity, mandate and/or authority to call for such any meetings of the Applicant members.

   vii. Phat the said meeting did not take place as the same was stopped by the provincial administration citing inter alia security reasons, and illegal procedure by the Respondents.

   viii. That the Respondents herein have resorted to crude ways unknowing to the law and the Applicant's Memorandum and Articles of Association of convening the intended meetings, where the 72nd Respondent has been calling the Applicant's Shareholders vide telephone lines and inviting them for a meeting to be held either on 24th or 25th ,November, 2021 where no notice exists.

   ix. That the said mode of calling for the Applicant's company Special General Meeting, is an action that violate the *Companies Act* and the applicants' Memorandum and Articles of Associations and thus ultra-vires to the law.

   x. That in the event that the said company meeting scheduled for the 24th or 25th November 2021 is held, having been unlawfully requisitioned by strangers to the applicant company, the same shall amount to grave violation of the *Companies Act*, the applicant

   xi. company's rights and interests as well as those of fully paid up and bonafide shareholders.

   xii. That the Respondents are not keen and have not followed due procedure as laid out in the *Companies Act* as relates to the calling of meetings of the Applicant Company and that the said illegal notice as relates to the calling of a special general meeting have not been served on the Applicant Company.

   xiii. That in the instance that the said scheduled meeting is held the substratum of this suit shall be expended and the suit herein shall be rendered moot.

3. On the Motion it is also supported by affidavit of Rachael Chege Njaga sworn on 24/11/2021.

4. The Respondents reply via affidavit of Martin Muriu Maina Affidavit sworn on 3/3/2022 and replying affidavit by John Njoroge Mburu sworn on 3/3/2022

5. There is also a supplementary affidavit by Racheal Chege Njuguna sworn on 24/2/2022.

6. The parties were directed via submissions but only respondents' submissions are on record

7. Defendant submissions dated 30/3/2022

8. The suit herein revolves around the validity of a meeting convened by the Defendants on 24.11.2021, who are bonafide, fully paid up members and shareholders at the Plaintiff's Company, a land buying company and who prior to the said meeting were, seemingly, unhappy about how the affairs of the company, generally were being managed.

9. The actions of the said directors consequently triggered the defendants to invoke their statutory rights as shareholders at the plaintiff's Company under the clear provisions of sections 277, 278 and 279 of the *Companies Act*, 2015.

10. By a Plaint erroneously dated 20.09.2019, the Plaintiff filed the suit herein seeking a host of prayers all related to the requisition notice dated 23.07.2021 for a general meeting of the Plaintiff's Company issued by the Defendants herein in exercise of their statutory rights aforesaid.

11. Contemporaneous with the Plaint, the Plaintiff had filed a Notice of motion dated 20.09.2021 seeking injunction orders against a meeting subsequently called by the Defendants and slated for 24.09.2021. On 15.11.2021 when this matter was mentioned in court for directions, the court ordered that the Applicant's Notice of Motion dated 20.09.2021 be deemed compromised for being overtaken by events. Consequently, the previous orders of 23.09.2021 which had injuncted the Defendants from convening an extra ordinary general meeting of the requisitionists were deemed vacated.

12. Under section 279 (3) of the *Companies Act*, 2015 the requisitionists were statutorily required to convene a meeting within three (3) months after the date when the previous directors were required to convene a meeting being on 23.08.2021 and, consequently, the said three (3) months period counting from the 24.08.2021 was due to expire on 24.11.2021.

13. Therefore, following the lifting of the injunction orders as submitted at paragraph (4) above, the Defendants issued a notice dated 16.11.2021 convening an extra ordinary general meeting on 24.11.2021 at 9.00 a.m.

14. By a Notice of Motion dated 24.11.2021, the Plaintiff filed the instant application seeking to stop the meeting which was set to be convened by the Defendants on the same day at 9.00 a.m. which meeting took place on 24.11.2021 at 9.00 a.m. and ending at around 11.00 a.m. in absence of any court order barring the said meeting and, consequently, insofar as the Notice of Motion dated 24.11.2021 was seeking to stop the said meeting, the same was, seemingly, overtaken by events and not even the court orders subsequently issued on 25.11.2021 could have saved the situation.

15. It is noteworthy however that at paragraphs (27) and (28) of the Plaintiff's written submissions, the Plaintiff erroneously submits that the instant application came up for inter-partes hearing on 24.11.2021 and that the court order was issued on even date in presence of all the parties, which is misleading to the court as the court record bare witness that the Notice of Motion dated 24.11.2021 was first considered by the court ex-parte on 25.11.2021 while the meeting of 24.11.2021 had already taken place a day before.

16. Indeed, as the court record would show, on 01.02.2022 it was a common ground of all the parties in court that the instant Notice of Motion was, seemingly, overtaken by events and thus the court had opined to the Plaintiff to amend the application within 3 days.

17. It would therefore follow that the submissions made by the plaintiff at paragraphs (30), (31), (32) and (33) of its written submissions that the meeting of 24.11.2021 is a nullity as there was allegedly a court order in placed barring the said meetings are merely misleading and do not hold any water.

18. Infact, on 01.02.2022, it is the advocate for the Plaintiff who had sought for three (3) days to enable him relook at the Notice of Motion dated 24.11.2021 upon the realization that the same was overtaken by events and could not proceed as originally filed but for reasons only known to the Applicant, the Applicant did not abide the court opinion and in the alternative, the Applicant chose to prosecute the instant application as originally filed.

19. In the result, it follows that among the six (6) prayers sought in the instant Notice of Motion, only a sole PRAYER (6) is live and open or consideration and determination by the court while the rest of the prayers; (1), (2), (3) and (5) either are already spent and/or otherwise effectively overtaken by events.

20. On merit it is submitted that the record, at paragraphs (16) (i), (j), (k), (l) and (m) and annexures marked "JNM-8", "JNM-9" "JNM-IO" and "JNM-II" to the replying affidavit, the Defendants have tendered documentary materials namely; a notice to convene the meeting dated 16.11.2021, a list of 132 attendees/ conveners of the subject extra ordinary meeting of the Plaintiff's company, minutes comprising the resolutions of the meeting as well as the minutes for the meeting of the newly elected board of directors held on even date at 12.00pm respectively.

21. Documentary material is good proof that an extra ordinary meeting of the Plaintiff's company at the behest of the requisitionists was indeed held on 24.11.2021 and it therefore follows that the ultimate question that would remain is whether the subject meeting was convened pursuant to the provisions of sections 277, 278 and 279 of the *Companies Act*, 2015.

> We respectfully submit from the outset that the question as to the legality of the meeting of the requisitionists held on 24.11.2021 is the substratum of the case herein which can only be considered substantially by the trial court at the hearing of the main suit because if the court was to consider the said question at the interlocutory stage, the main suit trial would effectively be rendered superfluous and moot.

22. That at prayer (6) of the instant Notice of Motion the Court is being asked by the Plaintiff to issue injunction orders at this interlocutory stage and, consequently, the Plaintiff being the Applicant must demonstrate the time-tested principles in Giella -Versus- Cassman Brown [1973] EA 358 .

23. For the applicant to succeed in the instant Notice of Motion the applicant is required to demonstrate the following;

    i. That the requisition notice dated 23.07.2021 is so inconsistent with the clear provision of article 70 of the articles of association of the Plaintiff's company and the clear provision of section 277 of the *Companies Act*, 2015.

    ii. That the requisition notice dated 23.07.2021 did not attain the statutory numerical threshold for a lawful requisition that is; being duly signed by not less than one tenth of membership representing the total voting rights of all members having a right to vote at a general meeting of the company.

    iii. That the meeting held on 24.11.2021 was generally contra-statute.

iv. That the resolutions made at the said meeting were so irregular and contra-statute and further in the very least the Applicant must demonstrate and show that;

v. That the newly elected board of directors is illegally in office.

24. Åpp1icant have dismally failed to demonstrate a prima facie case with likelihood of success in answer to the above questions. Instead, the Applicant has tendered wishy washy grounds that do not hold any water in bringing the instant application as demonstrated here below.

25. Respectfully respondent submit that as opposed to an ordinary general meeting called by the company which would ordinarily require a notice of about (21) - (30) days, the meeting of 24.11.2021 was an extra ordinary general meeting convened by the requisitionists pursuant to the clear provision of section 279 (3) of the *Companies Act*, 2015 and, notably, no specified notice period is provided for under the said section of the law which we quote herebelow;

"

"279. (1) If, after having been required to convene a general meeting under section 277, the directors fail to do as required by: section 278, the members who requested the meeting, or any of them representing- more than one half of the total voting Tights of au & them, may convene a general meeting.

i. If the requests received by the company included the text of a resolution intended to be moved at the meeting, the members concerned shall include in the notice convening the meeting the text of the intended resolution,

The members concerned shall ensure that the meeting is convened for a date not more than three months after the date on which the directors were requested to convene a meeting."

26. Section 279(3) of e *Companies Act*, 2015, the only requirement as to timelines is that the meeting be convened by the requisitionists within three months after the date on which the directors were requested to convene a meeting. The meeting of 24/11/2021 fully complied with the law at section 279 (3), supra and, consequently, the Plaintiff's submission at paragraphs (40) and (41) of its written submissions flies in the face of section 279(3) of the *Companies Act*, 2015.

27. For the record, section 281 (2) (b) of the *Companies Act* provides for notice for a meeting called by the company to members and is therefore inapplicable herein as the extra ordinary general meeting of 24.11.2021 was convened by requisitionists independent of the company and the previous directors pursuant to the clear provision pf section 279(3) of the *Companies Act*, 2015.

28. Secondly, it is the Applicant's contention at paragraphs (54) to (61) of its written submissions that the requisitionists of the meeting held on 24.11.2021 did not meet the requisite quorum of at least (97) shareholders with voting rights as accordingly to the Applicant, 106 of the said requisitionists are allegedly strangers and non- shareholders of the company therefore incapable, in law, in convening the meeting of 24.11.2021.

29. Defendants are not only bonafide fully paid up shareholders with voting rights at the company but, equally, are land owners at the Plaintiff's company with lawfully acquired title deeds in respect of their respective parcels of land. At annexure marked "JNM-2" to the replying affidavit, the Defendants have tendered a register of the said Defendants showing their respective shares certificates numbers at the Plaintiff's company.

30. The Applicant has not tendered any documentary material in support of the instant application to demonstrate that the said 106 requisitionists are not shareholders at the Plaintiff's company as alleged. Plainly speaking, nothing would have been easier than for the Applicant to file in court a register of Shareholders of the Plaintiff's company or adduce duly filed Plaintiff's Company's Beneficial Ownership Information under the clear provision of the Companies (Beneficial Ownership Information) ſRegulations, 2020. Indeed, he who alleges must proof.

31. At the annexture marked "JNM-3" to the replying affidavit (see page 29 thereof) the Respondents have adduced a letter dated 17.09.2015 authored by the Registrar of Companies calling for a reconciliation of the register of shareholders and noting in the subject letter that the register of shareholders at the company registry do not reflect the actual position on the ground and further noting the existence of two (2) disputant groups at the company.

32. It is noteworthy to submit that the onus of proof was/is squarely on the Applicant to demonstrate otherwise having alleged that the aid 106 requisitionsists are, allegedly, non-shareholders at the company. The Applicant has dismally failed to discharge the said legal burden.

33. It demonstrated that the events leading upto the extra ordinary meeting held on 24.11.2021 at 9 a.m. were squarely within the clear provisions of sections 277, 278 and 279 of the *Companies Act*, 2015.

34. Vide a requisition dated 23.07.2021 and received by the Company as well as the previous board of directors on 27.07.2021, the Defendants invoked article 70 of the Articles of Association of the Plaintiffs Company as well as the clear provision of section 277 of the *Companies Act*, 2015 and requisitioned for an Extra Ordinary General Meeting. [See annexure marked 'JNM -1' to the replying affidavit]

35. In compliance with the clear provision of section 277 (3) of the Act supra, the requisition dated 23.07.2021 had effectively been signed by more than the required minimum of 10% of the paid-up shareholders at the company representing (97) shareholders as the same had actually been signed by (147) fully paid up shareholders. [See annexure marked 'JNM -1 ' to the replying affidavit]

36. Further, under section 278 (a) and (b) of the Act, the said requisition gave the previous board of directors the requisite 21 days to consider the requisition and thereafter convene a meeting within 28 days.

37. A quick count of the days from 27.07.2021 being the day the requisition dated 23.07.2021 by the requisitionists was received by the Company and directors therefore shows that the previous directors were required to convene a meeting on or before 23.08.2021.

38. The requisition dated 23.07.2021 had equally, expressly stated the general nature of the business to be dealt with at the meeting including a text of a resolution that was proposed to be put to the meeting in accordance with section 277(5) of the Act and the same was served upon the Company and the previous directors in hard copy and duly stamped pursuant to the clear provision of section 277(7) of the Act. [See annexure marked 'JNM -1 ' to the replying affidavit at page (11) thereon.

39. Vide a letter dated 28.07.2021, the previous board of directors responded to the requisition dated 23.07.2021 declining to convene the meeting and the requisitionists took the said communication as an unreasonable and unfair refusal on the part of the previous board of directors to convene the meeting as sought and, consequently, at the expiry of the requisite 28 days, the requisitionists proceeded to issue a notice dated 30.08.2021 seeking to convene a meeting on 24.09.2021. [See annexures marked 'JNM -4' at page (30) and "JNM-5" at page (32) to the replying affidavit]

40. Upon receipt of the Notice dated 30.08.2021 by the requisitionists seeking to convene a meeting on 24.09.2021, the Applicant moved the court by a Notice of Motion dated 20.09.2021 and the court issued orders on 23.09.2021 restricting the Defendants from convening the subject meeting. The Defendants fully complied with the said court order. [See annexure marked 'JNM -6' to the replying affidavit]

41. On 15.11.2021, the matter was mentioned in court for directions when the court upon hearing oral arguments by counsels for all the parties ordered that the Applicant's Notice of Motion dated 20.09.2021 be deemed compromised for seemingly being overtaken by events. Consequently, the orders of 23.09.2021 were deemed vacated. [See annexure marked 'JNM -7' to the replying affidavit]

42. There being no court order barring the requisitionists from convening a meeting of shareholders and pursuant to the clear provision of section 279 (3) of the Act, the requisitionists issued a notice dated 16.11.2021 seeking to convene an Extra Ordinary General meeting on 24.11.2021. [See annexure marked 'JNM -8' to the replying affidavit]

43. Under section 279 (3) of the *Companies Act*, 2015 the requisitionists were required to convene a meeting within three (3) months after the date the previous directors were required to convene a meeting being, 23.08.2021 and, consequently, a quick count of the said three (3) months period counting from 24.08.2021 the period was due to expire on 24.11.2021.

44. Out of the 147 requisitionists, 132 requisitionists attended the meeting on 24.11.2021 surpassing the number of conveners contemplated under section 279 (1) of the Act, supra being more than one half of the said requisitionists. [See annexure marked 'JNM -9' to the replying affidavit]

45. Arising from the said Extra Ordinary General meeting, a resolution was passed to remove the previous directors from office and, subsequently, new directors were elected to replace the said directors. [See annexure marked 'JNM-IO' to the replying affidavit]

46. The new directors immediately assumed office and at about 12.00 pm a meeting of the newly elected board of directors convened when elections of the executive committee was undertaken. [See annexure marked 'JNM -11' to the replying affidavit]

47. In the foregoing chronology of events that preceded the extra ordinary meeting held by the Defendants on 24.11.2021, it is submitted that, the Applicant has not established a prima facie case with probability of success to show that the subject Extra Ordinary General meeting was held contra-statute and/ or was illegal/ nullity as alleged in the instant Notice of Motion.

48. In the alternative, the Defendants respectfully submit that they have demonstrated the validity of the subject meeting and shall equally do so at the hearing of the main suit in seeking that the suit herein be dismissed for being unmeritorious.

49. In the same breath, it would consequently follow that the substantive issues pleaded for by the Plaintiff in the main suit are clearly frivolous and it would be a great prejudice to the company's operations if the court was to grant an injunction on the basis of the said frivolous suit restraining the running of the day to day activities and operations of the company by the newly elected board of directors who are already in office.

50. It is submitted that, that granting of injunction orders in this case would, equally, militate against the elementary principle that courts do not exist to micromanage the affairs of the company.

51. It therefore follows that the Plaintiff's Notice of Motion dated 24.11.2021 effectively fails on its own as the law and the principles governing granting of injunction orders dictates that; an injunction order

cannot be granted where damages would be an adequate remedy. As a matter of fact, there is no gainsaying that the Plaintiff/ Applicant has pleaded itself out from being granted an injunction order by the court at the interlocutory stage going by its own pleadings in the Plaint document that damages would be sufficient remedy in the present suit.The Defendants rely in the case of Mureithi -Versus-City Council of Nairobi [1979] eKLR.

52. Issues Analysis and Determination

53. The court finds in the instant application and contents, the issue is whether the application is overtaken by events. if aforesaid in negative, has applicants established the threshold of temporary injunction? What are the orders as to costs?

54. The law on Interlocutory Injunctions

55. A temporary/interlocutory injunction is a court order made in the early stages of a lawsuit or petition that prohibits the parties from doing an act to preserve the status quo until a pending ruling or outcome.

56. The purpose of a temporary/ interlocutory injunction is to keep the parties, while the suit is pending, as much as possible in the respective positions they occupied when the suit began and to preserve the court's ability to render a meaningful decision after a trial on the merits.

57. Prior to the decision of Mativo J, the locus classicus case on granting of the interlocutory injunctions was the case of Giella vs Cassman Brown[1973] E. A 358, a decision of the Court of Appeal of Uganda (Sir William Duffus, P & Law J.A.), in a matter that was mainly in respect of an employment dispute, the court set the principles for injunctions when it held;

> As jurisprudence in the area has increased, judges have expounded on the above principles as follows;
>
> Whether the applicant has shown a prima facie case with a probability of success.
>
> On what a prima facie case is the case of Mrao v First American Bank of Kenya Limited & 2 Others [2003] eKLR , the Court of Appeal defined the same when the court held;
>
> > "So what is a prima facie case? I would say that in civil cases it 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 as 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. 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."

58. In light of the above, therefore, the onus of establishing a prima facie case commences from the evidence adduced before the courts and that indeed the case of the applicant's case is one that is arguable with a probability of success. Whether the applicant shall suffer irreparable injury which cannot be compensated by damages. However, a prima facie case is not the only yardstick an Applicant must meet.

59. In the case of Nguruman Limited Vs Jan Bonde Nielson & 2 Others [2014] eKLR, the Court of Appeal expounded on this when it held that;

> "In an interlocutory injunction application, the applicant has to satisfy the triple requirements to; a. establish his case only at a prima facie level,b. demonstrate irreparable injury if a temporary injunction is not granted, and c. ally any doubts as to (b) by showing that the balance of convenience is in his favour.
>
> These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct, and logical hurdles that the applicant is expected to surmount sequentially.
>
> See Commercial Finance Co. Ltd V. Afraha Education Society [2001] Vol. 1 EA 86. If the applicant establishes a prima facie case that alone is not a sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable.
>
> In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If a prima facie case is not established, then irreparable injury and balance of convenience need no consideration.
>
> The existence of a prima facie case does not permit "leap-frogging" by the applicant to injunction directly without crossing the other hurdles in between.
>
> The second factor, that the applicant must establish that he "might otherwise" suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate, prima face, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant.
>
> The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial, and demonstrable; an injury that cannot "adequately" be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be an adequate remedy."
>
> If the court is in doubt, then it can decide the application on a balance of convenience. The last pillar for an applicant to meet, which lies on the court exercising some discretion and restraint, is for the court to consider on which end justice would lie, as noted in the English case of Films Rover International Vs. Cannon Films Sales Ltd (1986) 3 All ER 772 in which the said judge made this point regarding the grant of injunctive relief:

60. From the above jurisprudence, the three principles are sequentially applicable for a court today before the granting of an interlocutory injunction. Expounding the Principle In the ruling of Mativo J, the learned judge went on to delve into detail on the above pillars and affirming the same as follows;

> In an application for an interlocutory injunction, the onus is on the applicant to satisfy the court that the court should grant an injunction. The court noted the principles in Geilla v Cassam Brown (supra) are applicable. He further relied on the Canadian case of R. J. R.

Macdonald v Canada (Attorney General) (1994) 1S.C.R. 311, wherein the court therein laid down a three-part test of granting an injunction as follows;

> Is there a serious issue to be tried?
>
> Will the applicant suffer irreparable harm if the injunction is not granted?
>
> Which party will suffer the greater harm from granting or refusing the remedy pending a decision on the merits? (often called "balance of convenience").

61. In respect of the 'serious question to be tried,' the learned judge went on to rely on the case of Mbuthia v Jimba Credit Corporation Ltd (1988) KLR 1, wherein the court stated that

> " it is not required to make final findings of contested facts and law but only needs to weigh the relative strength of the party's cases. The strength of the probability depends on the nature of the rights asserted and the practical consequences likely to flow from the interlocutory order sought. The court should take whichever course that appears to carry the lower risk of injustice if it should turn out to have been "wrong". In determining which course carries the lower risk of injustice, the court is informed by, among other things, the well-established interrelated considerations of whether there is a serious question to be tried and whether the balance of convenience or justice favours the grant. To justify the imposition of an interlocutory injunction, the plaintiff must be able to show a "sufficient likelihood of success." And that it is beyond doubt that the prima facie case test represents the law in relation to the grant of interlocutory injunctions"

62. On the first issue, the court record shows and the record reflects that the Notice of Motion dated 24.11.2021 was first considered by the court ex-parte on 25.11.2021 while the meeting of 24.11.2021 had already taken place a day before.

63. Indeed, as the court record would show, on 01.02.2022 it was a common ground of all the parties in court that the instant Notice of Motion was, apparently, overtaken by events, and thus the court had advised the Plaintiff to amend the application within 3 days.

64. It therefore follows that the submissions made by the plaintiff in paragraphs (30), (31), (32) and (33) of its written submissions that the meeting of 24.11.2021 is a nullity as there was allegedly a court order in place barring the said meetings are misleading.

65. On 01.02.2022, it is the advocate for the Plaintiff who had sought three (3) days to enable him to relook at the Notice of Motion dated 24.11.2021 upon the realization that the same was overtaken by events and could not proceed as originally filed but for reasons only known to the Applicant, the Applicant did not abide with the court view and in the alternative, the Applicant chose to prosecute the instant application as originally filed.

66. In the result, it follows that among the six (6) prayers sought in the instant Notice of Motion, only a sole PRAYER (6) is live and open for consideration and determination by the court while the rest of the prayers; (1), (2), (3) and (5) either are already spent and/or otherwise effectively overtaken by events.

67. The same is to the effect that;"....a temporary injunction restraining the Respondents herein jointly and severally from calling for and conducting any meeting of the Applicant company...'

68. However, prayer 6 could not stand in isolation and or on its own. It presupposes that the meeting in issue was stopped and thus disabling the respondents from functioning therefore unable to manage the company whatsoever. The applicant does not deny that the respondents are in charge of the running

of the company and thus calling for and conducting any meeting of the Applicant company is core of the management of the company.

69. The court therefore finds that the application was overtaken by events thus same application is rejected. Thus, the court makes the following orders;

    i. The application is dismissed with orders being in the main cause.

    ii. The suit is to be heard on a priority basis.

DATED, SIGNED, AND DELIVERED AT NYANDARUA THIS 19TH MARCH 2024

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C KARIUKI

JUDGE