



REPUBLIC OF KENYA



KENYA LAW
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**Yussuf & another v Tanall Holdings Limited & 11 others; Registrar
of Companies (Interested Party) (Civil Suit E307 of 2023)
[2024] KEHC 5250 (KLR) (Commercial and Tax) (30 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 5250 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT E307 OF 2023**

A MABEYA, J

APRIL 30, 2024

BETWEEN

KHADAR AHMED YUSSUF 1ST PLAINTIFF

AFRICANA ENERGY LIMITED 2ND PLAINTIFF

AND

TANALL HOLDINGS LIMITED 1ST RESPONDENT

KITRA INDUSTRIES LIMITED 2ND RESPONDENT

DANTECH VENTURES LIMITED 3RD RESPONDENT

ESTTECH AFRICA LIMITED 4TH RESPONDENT

OSTAP AFRICA LIMITED 5TH RESPONDENT

WANDAR AFRICA LIMITED 6TH RESPONDENT

ANG LI LI 7TH RESPONDENT

TAN CHIN HENG 8TH RESPONDENT

TAN CHIN TEIK 9TH RESPONDENT

TAN SOK LENG 10TH RESPONDENT

CHE CHOONG HO 11TH RESPONDENT

TAN SING CHIA 12TH RESPONDENT

AND

REGISTRAR OF COMPANIES INTERESTED PARTY



RULING

1. Before Court is an application dated 3/7/2023. It was brought under section 3A of the *Civil Procedure Act*, Order 40 Rules 1 and Order 51 Rule 1 of the *Civil Procedure Rules*.
2. Orders 1 and 2 were spent. The remaining orders sought orders to restrain the interested party from removing the applicant as a director of the 1st respondent pending the hearing and determination of the suit. It also sought orders to bar the 1st, 7th, 8th, 9th, 10th, 11th and 12th respondent from disposing off any properties belonging to the 1st respondent pending the hearing and determination of the suit.
3. The grounds for the application were set out on the face of it and in the supporting affidavit of Ahmed Yussuf sworn on 3/07/2023. It was contended that the applicant registered the 1-6th respondent companies between 2014-2015 for purposes of trading and conducting business. That he was both director and shareholder in the companies apart from the 1st respondent company where he was only a director.
4. That the applicant and the 7 to 12th respondent acquired various properties together including LR No. 12672/194, LR No. 22073, 4 apartments in Western Heights in Westlands and Apartment No. 5, Block 5 in Kenya Re Gardens, South C among others.
5. That sometime in 2018, the 7th-12th respondent excluded the applicant from managing the companies and he later realized that they fraudulently transferred most of the properties registered under the 2-6th respondent to the 1st respondent. That they later tried to remove him from directorship in the 1st respondent but the applicant filed a caveat with the interested party. That they remained uncooperative when the applicant attempted amicable settlement of the outstanding issues and now intended to remove him from directorship again pursuant to section 139 of the *Companies Act*.
6. He contended that there was an active case in Milimani CMCC No. 5879 of 2017 involving him and the 1st-3rd respondent regarding Apartment No. 5, Block 5 in Kenya Re-Gradens which was yet to be resolved.
7. He therefore contended that unless the orders sought were granted to restrain the interested party from removing him from the directorship as aforesaid until the issue of damages and reimbursement was resolved, he faced an imminent threat of losing all his entitlements from the companies. That the 7th-12th respondent were foreigners who did not reside in Kenya and the applicant would be unable to trace them. This court was thus implored to grant the orders sought.
8. The respondents opposed the application vide the replying affidavit sworn by Tan Sing Chia on 24/7/2023. It was contended that the applicant convinced the 12th respondent to make him a shareholder and director as it was a mandatory requirement under the Kenyan regulations and consequently, the 12th respondent set up the 1st-6th respondent companies. That the applicant only participated in the registration of the 1st-6th respondent companies as a trustee based on his misrepresentation of the Kenyan legal requirements.
9. It was admitted that the applicant was a shareholder and director in the companies but the shares were freely given to him based on trust and there was no consideration or contribution from the applicant towards incorporation of the 1st-6th respondent companies.
10. That the application was for the removal of the applicant from the 1st respondent company and there was no reasonable cause of action against the 2-6th respondent. That the applicant had committed fraud



including failing to pay clearance fees remitted to him for the clearance of MDF bonds worth USD 159,078 which were withheld at the Mombasa Port due to non-payment of the clearance fee. That the applicant further procured USD 20,000 for alleged services to see to the discharge of the shipment.

11. That the applicant also rented out the apartment purchased by the 12th respondent in South C Estate around February 2014 without consent and was collecting rent and had attempted to sell the apartment for Kshs. 18,000,000/=. It was further averred that the applicant never participated in the acquisition of the apartments and was excluded from management of the companies due to embezzlement of the Companies' funds. That the interested party advised all the directors of the 1st respondent to sit and resolve the issues but the applicant demanded a sum of Kshs. 101,570,000 to unjustifiably enrich himself.
12. It was admitted that the 7th-12th respondent had already voted and passed a resolution to remove the applicant as a director of the 1st respondent pursuant to section 139 of the *Companies Act* and the same was justified owing to the fraudulent actions of the applicant.
13. That the applicant was sufficiently informed of the reasons for his removal as director and his reservations to the removal were responded to. It was thus averred that the vote to remove the applicant as a director was procedurally fair and done in compliance of the *Companies Act* 2015. That Section 139 of the *Companies Act* provided for removal of a director and as a principle, the court ought not to interfere with the internal management of companies acting within their powers.
14. The 12th respondent also contended that the application was overtaken by events as the applicant had already been voted out as director of the 1st respondent and a resolution passed during the Extra-Ordinary General Meeting on 22/6/2023.
15. That the suit in Milimani CMCC Civil Case No. 5879 of 2017 regarding Apartment No. 5 Block 5 in Kenya Re-Gardens did not relate to the directorship of the applicant and was not a bar to the removal of the applicant as a director of the 1st respondent.
16. It was finally averred that the application did not meet the threshold required for the granting of the orders sought and it ought to have been dismissed with costs.
17. The applicant's submissions were dated 15/9/2023 whereas the 1st-3rd and 7th-12th respondents filed submissions dated 26/10/2023. This court has considered those submissions alongside the pleadings and evidence before it. The simple task for this court is to establish whether the application has met the grounds for granting of injunctive orders.
18. The conditions for consideration in granting an injunction were settled *Giella v Cassman Brown & Company Limited* (1973) EA 358. These are that; first, an applicant must show a *prima facie* case with a probability of success. Secondly, that an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury and thirdly, if the court is in doubt, it will decide an application on the balance of convenience.
19. In *Mrao Limited v First American Bank of Kenya and 2 Others* (2003) KLR 125, the Court of Appeal in determining what amounts to a *prima facie* case stated: -

“A *prima facie* case in a Civil Case include but is not confined to a “genuine or arguable” case. It is a case which on the material presented to the court, a tribunal properly directing itself will conclude 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 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.”

20. On whether the applicant established a prima facie case with probability of success, I note that it was not a disputed fact that the applicant was a director of the 1st respondent company and a director and shareholder in the 2nd-6th respondent companies. It was also not a disputed fact that the respondents had indeed voted out the applicant as a director in the 1st respondent company and that a resolution was passed in the Extra-Ordinary General Meeting on 22/6/2023.
21. The applicant was also able to establish that there was a dispute relating to the damages and compensation that he sought from the respondents. The respondents did not deny existence of the issue but averred that the applicant was only a director and shareholder as trustee and he never contributed to the registration of the companies or any of the acquisitions made by the companies. The respondents thus disputed any claim for damages or compensation.
22. From the foregoing, it is clear that there is a dispute which can only be determined in a full trial before a determination on damages and compensation is made. That is not an issue that can be determined at an interim stage. I also note that the respondent did not contest the allegation that the 7th-12th respondents had transferred the companies acquisitions to the 1st respondent without the applicant's knowledge or participation.
23. It then follows that the respondents' action were premature and the applicant's rights as a director and shareholder were infringed. The applicant has a case against the respondents and the same has a probability of success.
24. It would also be unjust to allow the respondents to remove the applicant without a resolution on the applicant's claim for damages and compensation despite the admission that he is indeed a director and shareholder in the companies. It has already been held that the issue of contribution and whether or not the applicant is deserving of damages is an issue to be determined on merit after the trial is concluded. However, the fact remains that the applicant has rights both as a shareholder and as a director in the respondent companies and those rights cannot be wished away.
25. Lastly, there were serious claims of fraud and embezzlement against the applicant and it is only trite that the claims proceed to trial as the entire decision to remove the applicant from directorship was based on those claims. There is a need to test the truthfulness of those allegations in order to justify the respondents' actions against the applicant, noting that amongst the prayer sought in the plaint is a permanent injunction restraining the respondents from removing the applicant as a director in the 1st respondent.
26. In the circumstances, it is my finding that the applicant has successfully demonstrated that he has a *prima facie* case which is arguable and has a probability of success.
27. As to whether the applicant will suffer irreparable harm, I refer to *Halsbury's Laws of England*, 3rd Edition Volume 21, Paragraph 739 page 352 which defines irreparable injury as: -

“injury which is substantial and could never be adequately remedied or atoned for by damages, not injury which cannot possibly be repaired and the fact that the plaintiff may have a right to recover damages is no objection to the exercise of the jurisdiction by grant of injunction, if his rights cannot be adequately protected or vindicated by damages. Even where the injury is capable of compensation in damages, an injunction may be granted, if



the injury in respect of which relief is sought is likely to destroy the subjected matter in question."

28. I note that the respondents admitted that the applicant had already been voted out as a director in the 1st respondent company and a resolution had been passed in the Extra-Ordinary General Meeting on 22/6/2023. What was remaining was for the interested party to effect the changes in the companies register. If such change is effected, then the applicant stands the risk of being blocked out from all the companies' activities and will lose all his rights as a director of the 1st respondent without having prosecuted his claim for damages and compensation or defended himself against the claims of fraud and embezzlement.
29. I also note that the respondents did not deny being foreigners. Should the respondents be allowed to oust the applicant as a director without all issues being resolved, it is likely that the applicant's efforts to prosecute his claim will be frustrated. I also note that there is the risk of properties being transferred or sold to third parties despite that the applicant remains a director and shareholder. This too would jeopardize the applicant's interests if such transfer or sale is not restrained.
30. It is thus this court's finding that the applicant stands to suffer irreparable harm should the orders sought not be granted.
31. From the foregoing, it follows that the balance of convenience tilts in favor of the applicant who is admittedly a director and shareholder in the respondent companies.
32. The upshot is that the application dated 3/7/2023 is meritorious and is allowed as follows: -
 - a. A temporary injunction is hereby issued restraining the interested party (Registrar of Companies) from removing the applicant as a director of the 1st respondent, Tanall Holdings Limited, pending the hearing and determination of the suit.
 - b. A temporary injunction hereby issues barring the 1st, 7th, 8th, 9th, 10th, 11th and 12th respondent from disposing off any properties belonging to the 1st respondent pending the hearing and determination of the suit.
 - c. The applicant is hereby awarded costs of the application.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 30TH DAY OF APRIL, 2024.

A. MABEYA, FCI Arb

JUDGE

