



**Chebwojen & 8 others v Kositany & 2 others (Civil Suit
E003 of 2024) [2024] KEHC 7233 (KLR) (20 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 7233 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERICHO
CIVIL SUIT E003 OF 2024
JK SERGON, J
JUNE 20, 2024**

BETWEEN

**EVERLINE CHEBWOGEN 1ST PLAINTIFF
KIPTERER JULIUS KOSKEY 2ND PLAINTIFF
PAUL KIPROTICH SIGEI 3RD PLAINTIFF
STEPHEN CHERUIYOT TOO 4TH PLAINTIFF
K. A CHIRCHIR ERICK 5TH PLAINTIFF
ANDREW CHERUIYOT ROTICH 6TH PLAINTIFF
NEHEMIAH KIBIEGON BOR 7TH PLAINTIFF
CHARLES KIPYEGON CHEKWONY 8TH PLAINTIFF
ELIZEBETH CHEPNGETICH SIELE 9TH PLAINTIFF**

AND

**BETTY CHEMUTAI KOSITANY 1ST DEFENDANT
KIBET ELIJAH ARAP SOI 2ND DEFENDANT
SIMEON KIMUTAI SOI 3RD DEFENDANT**

RULING

1. The application coming up for determination is a notice of motion dated 5th March, 2024 seeking the following ex parte and inter- partes reliefs;
 - (i) Spent
 - (ii) That this application and the suit herein be heard on a priority basis.



- (iii) That pending hearing and determination of this application inter partes an order do issue against the 1st, 2nd and 3rd Respondents to forthwith make full disclosure of the particulars of the sale agreement (s) made by the said defendants and undisclosed persons, between the months of December 2023 and January, 2024 involving the land parcels known as LR No. 631/16/III and all the buildings and improvements erected thereon known as Nenyon House or land parcel known as Kericho/Municipality Block 4/751 and/or the land parcel known as Kericho/Municipality Block 4/753, all of which land parcels belong to Nenyon Company Limited and are situate within Kericho Town.
 - (iv) That pending hearing and determination of this application inter partes a temporary injunction do issue against the 1st, 2nd and 3rd Respondents, either by themselves or their agents or any other person on their directions restraining the said respondents from withholding, from the plaintiffs and other members or shareholders of Nenyon Company Limited, any information related to the affairs and operations of the Company, generally and in relation to the sale of land agreement (s) made by the said defendants and undisclosed persons, between the months of December, 2023 and January, 2024 involving the land parcels known as LR No. 631/16/III and all the buildings and improvements erected thereon known as Nenyon House or land parcel known as Kericho/Municipality Block 4/751 and/or the land parcel known as Kericho/Municipality Block 4/753.
 - (v) That pending hearing and determination of this application inter partes a temporary injunction do issue against the 1st, 2nd and 3rd Respondents, either by themselves or their agents or any other person on their directions restraining the said respondents from offering for sale, selling, disposing off, charging, leasing, transferring, encumbering, alienating and/or interfering or in any way dealing with the interests owned by the plaintiff and or Nenyon Company Limited in the land parcels known as LR No. 631/16/III and all the buildings and improvements erected thereon known as Nenyon House or land parcel known as Kericho/Municipality Block 4/751 and/or the land parcel known as Kericho/Municipality Block 4/753 or completing any of the aforementioned transactions, without any notice, reference, special resolution and or any other consent of the plaintiffs and other members or shareholders of Nenyon Company Limited.
 - (v) That pending hearing and determination of the application inter partes, a temporary injunction do issue against the 1st, 2nd and 3rd Respondents, either by themselves or their agents or any other person on their directions restraining the said respondents from transacting any business on behalf of Nenyon Company Limited without a special resolution to that effect passed by the company shareholders.
 - (vi) That pending hearing and determination of the application inter partes, a temporary injunction do issue against the 1st, 2nd and 3rd Respondents, either by themselves or their agents or any other person on their directions restraining the said respondents from, in relation to Nenyon Company Limited, engaging in any conduct that constitutes contravention of, or failure to comply with, the *Companies Act*.
2. The application is based on grounds on the face of it and the supporting affidavit of Evaline Chebwogen on behalf of her co-applicants.
 3. The applicant avers that she is the person representative of the estate of John Kiprono A. Chuma (deceased) and therefore filed the instant application on behalf of the said estate and the benefit of the dependents of the deceased. The applicant further avers that the deceased was a shareholder and director of Nenyon Company Limited (hereinafter referred to as the Company.)



4. The applicant avers that the other applicants are shareholders or personal representatives of the estates of deceased shareholders of the Company.
5. The applicant avers that the Company whose main objective is investment in real estate was duly incorporated and registered under Certificate No C106xxx with nominal share capital and ordinary shares.
6. The applicant avers that the company owns several pieces of property in Kericho Town registered in the Company's name and which property includes land parcels known as LR No. 631/16/III and all the buildings and improvements erected thereon known as Nenyon House or land parcel known as Kericho/Municipality Block 4/751 and/or the land parcel known as Kericho/Municipality Block 4/753, all of which land parcels belong to Nenyon Company Limited and are situate within Kericho Town.
7. The applicant avers that all decisions involving and/or affecting the company are made via special resolution of the company shareholders, including the applicants herein and further that the said properties are not and have never been available for sale and that notices have been placed in conspicuous places within the said properties warning the general public of the same.
8. The applicant avers that they were apprehensive that between the months of December, 2023 and January, 2024, the respondents jointly or severally without any notice, reference, special resolution and/or any other consent from the shareholders and ultra vires their authority under mysterious circumstances fraudulently sold off the company's properties.
9. The applicant avers that they were strangers to the transaction upon being invited to receive cheques of Kshs. 2, 000, 000/= each without a plausible explanation as to how the monies were raised., which cheques the applicants declined to bank or otherwise monetize.
10. The applicant avers that despite the shareholder's persistent demands for explanation as to why they were being paid and the details of the transaction, the respondents have declined, ignored and/or refused to provide the said information thereby necessitating the instant suit.
11. The applicant avers that the said actions jointly and/or severally executed are illegal , oppressive and prejudicial to their interests and authority as shareholders of the Company and its shareholders. The applicant proceeded to set out in detail the particulars of the alleged illegal, oppressive, unfairly prejudicial and/or fraudulent actions of the 1st, 2nd and 3rd Respondents.
12. The applicant avers that they were therefore seeking protection of this Court against the aforementioned actions of the respondents that were inimical to the interests of the shareholders of the Company and an injunction restraining the respondents from engaging in the aforementioned conduct which was in contravention and/or failure to comply with the provisions of the [Companies Act](#).
13. The applicant avers that its in the interest of justice that this application and suit be expeditiously determined.
14. The respondent filed their replying affidavit sworn by Betty Chemutai Kositany (the 1st respondent herein) a director of Nenyon Company Limited and on behalf of her co-directors named herein as the 2nd and 3rd respondents respectively.
15. The respondent avers that the decision making organs of a company incorporated in the Republic of Kenya under the [Company's Act](#) are not restricted to special resolutions as alleged but include annual general meetings as well.



16. The respondent avers that contrary to the plaintiffs/applicants averments, the Nenyon Company Limited properties known as LR No. 631/16/III, Kericho/Municipality Block 4/751 and Kericho/Municipality block 4/753 (herein referred to as the suit properties) have been available for sale to any willing buyer, since 26th August, 2021 a period of 3 years.
17. The respondent avers that vide Min9/AGM/2020 special agenda items for sale of properties, all the suit properties were made available for sale by the shareholders of Nenyon Company Limited by a unanimous resolution in their annual general meeting held on 26th August, 2021.
18. The respondent avers that following the acceptance of the offer made to Nenyon Company Limited by Tulwet Farmers Agrovet Ltd and the subsequent execution of a land sale agreement between the parties, a deposit of Kshs. 50,000,000/= was paid as part consideration, out of which sum of money each shareholder was paid Kshs. 2,000,000/=.
19. The respondent avers that the applicants had not substantiated the alleged acts of fraudulent dealings on the part of the directors/respondents herein or that the conduct of the business of the subject company merits the orders sought in the application.
20. The respondent submitted that the instant application is premature and devoid of merit and should therefore be dismissed.
21. The matter came up for inter partes hearing on 8th May, 2024 the court having declined to issue the ex parte orders, the court directed the parties canvass the application via written submissions.
22. The applicants complied and filed their submissions. The applicants submitted that they had met the criteria for grant of orders of temporary injunction and cited the case of *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] eKLR, where the court of Appeal held that;-

In an interlocutory injunction application, the applicant has to satisfy the triple requirements; (a) establishes his case only at a *prima facie* level, (b) demonstrates irreparable injury if a temporary injunction is granted and (c) allay any doubts as to b, by showing that the balance of convenience is in his favour. These are the three pillars on which rest the foundation of any order of injunction interlocutory or permanent. It is established that all the above three conditions and states are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially.

23. The applicants submitted that the the replying affidavit filed in rebuttal of the their case, was of no probative value as it offended the provisions of rule 9 of the *Oaths and Statutory Declarations Rules* which stipulates as follows;

“All exhibits to affidavits shall be securely sealed thereto under the seal of the commissioner and shall be marked with serial letters of identification.”

The applicants cited the case of *Solomon Omwenga Omache & Another v Zachary O Ayieko & 2 others* [2016] eKLR where Justice Mutungi stated as follows;

“... Before the court is a replying affidavit with annexures which are neither marked nor sealed with commissioner’s stamp. Are they really exhibits? I do not think so and they cannot be properly admitted as part of the record. I expunge the exhibits and in effect that renders the replying affidavit incomplete and therefore the same is also for rejection as without the annexures it is valueless. This should serve as a wakeup call to practitioners not to be too casual when processing documents for filing as it could be extremely costly to them or their



clients as crucial evidence could be excluded owing to counsels or their assistant's lack of attention and due diligence.”

24. The applicants submitted that in their application for a temporary injunction, they had established a *prima facie* case as established in the case of *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* [2003] eKLR where the Court of Appeal observed as follows;

“A *prima facie* case in a civil application includes but is not confined to a “genuine and arguable case.” 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 to call for an explanation or rebuttal from the latter.”

25. The applicants further submitted that irreparable injury would be occasioned to them, if an order of temporary injunction was not granted, they would lose a 48 year old prime property, they cited the case of *Pius Kipchirchir Kogo v Frank Kimeli Tenai* (2018) eKLR, the Court expressed itself as follows; -

“irreparable injury means that the injury must be one that cannot be adequately In compensated for in damages and that the existence of a *prima facie* case is not itself sufficient. The applicant should further show that irreparable injury will occur to him if the injunction is not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury.

26. The applicant further submitted that the balance of convenience tilts in their favour as the sale of land transaction had not yet been completed and therefore the respondents would not suffer prejudice if the orders sought are not granted and cited the case of *Amir Suleiman v Amboseli Resort Limited* [2004] eKLR where the learned judge elaborated on what is meant by “balance of convenience, by stating that;

“The court in responding to prayers for interlocutory injunctive reliefs should always opt for the lower rather than higher risk of injustice.”

27. The applicants submitted that it was evident the advocate on record for the respondents, Ms. Stella Koech had prepared and witnessed the impugned sale agreement and other company correspondence that directly touches on the dispute in question and she was therefore a potential witness whereas rule 9 of the Advocates (Practice) Rules calls upon an advocate to be conscious of a potential conflict of interest at all times and to cease acting in a matter if it becomes apparent that they will be called as a witness. They relied on the case of *Francis Mugo & 22 others v James Bress Muthee & 3 others* [2005] eKLR where in similar circumstances, the court observed as follows;

“While I agree that the choice of counsels is a prerogative of a party to a suit, it must be borne in mind that in the discharge of his office, an advocate he has a duty to his client, a duty to his opponent, a duty to the court, a duty to himself and a duty to the state as was well put by *Richard Du Cann in “The Art of the Advocate.”* As an officer of the court, he owes allegiance to a cause that is higher than serving the interests of his client and that is to the cause of justice and truth. I believe that Mr. Musangi, as a good officer of the court, will ascend to a higher echelon of service to the cause of justice by his disqualification from acting for the plaintiffs in this matter so that he can fulfil the wider cause of his duty.”

28. At the time of writing this ruling the respondent was yet to file their Submissions on the Case Tracking System.



29. I have considered the pleadings and submissions by the parties and the sole issue is whether to grant a temporary injunction restraining the respondents from engaging in the aforementioned conduct which was in contravention and/or failure to comply with the provisions of the Companies Act. Temporary injunctions are provided for in order 40 of the Civil Procedure Rules. Order 40 recognizes that a temporary injunction will be sought where a property in dispute is in danger of being wasted, damaged, or alienated, or wrongfully sold in execution of a decree, or where a party threatens or intends to remove or dispose of the property in order to defeat any execution that may ultimately be passed. An injunction may also be applied for to restrain a party from committing a breach of contract or other injury. It is equally settled that a temporary injunction cannot be claimed as a matter of right, neither can it be denied arbitrarily by the court. Because of its importance and susceptibility to abuse certain guidelines have been developed while considering an application for temporary injunction. The three well-known tests enunciated in *Giella v Cassman Brown* (1973) EA 358 are to the effect that a party seeking a temporary injunction has to establish a *prima facie* case, whether the party seeking injunction will suffer irreparable damage if injunction is denied, and in case of doubt the issue in contention ought to be decided on the scale of a balance of convenience.
30. I find that the applicants being shareholders and/or personal representatives of the shareholders of the Nenyon Company Limited, have proven a *prima facie* case, the applicants are contesting the purported sale of several company properties situate in Kericho which according to them was shrouded in secrecy and that the respondents herein have withheld material information on the sale transaction. The applicants have proven irreparable injury, that they would lose prime property that was located in the Kericho Central Business District upon completion of the purported sale. The applicants have proven that the balance of convenience is tilted in their favour, for the reason that the purported sale is yet to be completed. In the case Paul Gitonga Wanjau v Gathuthi Tea Factory Company Ltd & 2 Others [2016] eKLR, where the Court expressed itself thus:-
- “Where any doubt exists as to the applicants’ right, or if the right is not disputed, but its violation is denied, the court, in determining whether an interlocutory injunction should be granted, takes into consideration the balance of convenience to the parties and the nature of the injury which the Respondent on the other hand, would suffer if the injunction was granted and he should ultimately turn out to be right and that which injury the applicant, on the other hand, might sustain if the injunction was refused and he should ultimately turn out to be right...Thus, the court makes a determination as to which party will suffer the greater harm with the outcome of the motion. If the applicant has a strong case on the merits or there is significant irreparable harm, it may influence the balance in favour of granting an injunction. The court will seek to maintain the status quo in determining where the balance on convenience lies.”
31. The application dated 5th March, 2024 is hereby allowed, giving rise to the following consequential orders;
- (i) That pending hearing and determination of the substantive suit a temporary injunction do issue against the 1st, 2nd and 3rd Respondents, either by themselves or their agents or any other person on their directions restraining the said respondents from offering for sale, selling, disposing off, charging, leasing, transferring, encumbering, alienating and/or interfering or in any way dealing with the interests owned by the plaintiff and or Nenyon Company Limited in the land parcels known as LR No. 631/16/III and all the buildings and improvements erected thereon known as Nenyon House or land parcel known as Kericho/Municipality Block 4/751 and/or the land parcel known as Kericho/Municipality Block 4/753 or completing any of the



aforementioned transactions, without any notice, reference, special resolution and or any other consent of the plaintiffs and other members or shareholders of Nenyon Company Limited.

(ii) That the suit herein to be heard and determined on a priority basis.

(iii) The suit is hereby fixed for trial conference on 25/9/2024.

DELIVERED, SIGNED AND DATED AT KERICHO THIS 20TH DAY JUNE, 2024.

J. K. SERGON

JUDGE

In the presence of:

C/Assistant – Rutoh

Miss Koech for the Defendant

Ochieng for the Plaintiff

