

KENYA / JUDGMENT

Bing & another v Shuitong [2025] KEHC 9032 (KLR)

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COURT

High Court

BEFORE

DO Chepkwony

CASE / FILE NUMBER

Commercial Miscellaneous Application E004 of
2025

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Bing & another v Shuitong (Commercial Miscellaneous Application E004 of 2025) [2025] KEHC
9032 (KLR) (21 May 2025) (Ruling)

Neutral citation:

[2025] KEHC 9032 (KLR)

Republic of Kenya

In the High Court at Kiambu

Commercial Miscellaneous Application E004 of 2025

DO Chepkwony, J

May 21, 2025

Between

Chen Bing

1st Applicant

Fujian Shizin Investment and Developers (K) Limited

2nd Applicant

and

Chen Shuitong

Respondent

Ruling

1. On 13th May, 2025, counsel for both parties appeared before this Court for the inter-partes hearing of the Respondent's application dated 24th April, 2025. The application principally seeks the review and/or setting aside of the interim injunctive orders previously issued by this court which had restrained the Respondent from accessing or dealing with the assets of the 2nd Applicant Company and directed the surrender of certain motor vehicles belonging to the 2nd Applicant to Ndeiya Police Station.
2. Learned counsel for the Respondent, Mr. Mukuna, submitted that the said orders are highly prejudicial to both the Respondent and the 2nd Applicant Company, as they have effectively paralyzed the Company's operations. He argued that the orders were obtained through material non-disclosure, particularly the Applicants' failure to inform the court that there are ongoing criminal investigations and pending charges against them involving the attempted fraudulent transfer of shareholding through the forgery of the Respondent's signature, thereby seeking to unlawfully dispossess him of his ownership interests in the Company.
3. Counsel contended that the Applicants failed to disclose these crucial facts, and as such, approached the court without clean hands. Additionally, it was submitted that the Applicants relied on forged logbooks, which are inconsistent with official records obtained from the National Transport and Safety Authority [NTSA]. Moreover, the impugned orders are said to be contradictory in nature whereby on one hand, they restrain the Respondent from engaging in any dealings with the 2nd Applicant, while on the other hand, directing that certain motor vehicles be surrendered to Ndeiya Police Station without clarifying who should execute the order. In light of these concerns, counsel urged the court to vacate the said orders, save for the portion restraining the transfer of the company's assets, in order to preserve the substratum of the suit while allowing the company's core operations to continue.
4. In response, learned counsel for the Applicants, Mr. Rogers Alinyo, opposed the application. He submitted that the present application is sub-judice in view of a prior application dated 7th April, 2025 filed by the Respondent, which seeks similar reliefs in respect of the orders issued on 26th March, 2025. In his view, the court ought not entertain the present application at this stage, and should instead give directions for the filing of submissions and thereafter render a substantive ruling.
5. Counsel further averred that the Respondent erroneously refers to orders alleged to have been issued on 1st April, 2025, yet no such orders exist on record. He further asserted that contrary to the Respondent's claims of impracticability, the court's directions were explicit and implementation was only frustrated by the failure of the Officer Commanding Station [OCS], Ndeiya Police Station, to enforce the said orders.

Determination

6. In order to appreciate the issues presently before this Court, it is imperative, at the outset, to set the historical context of this matter. This suit was instituted through a Notice of Motion application dated 4th March, 2025 in which the 1st Applicant, Chen Bing, sought leave under Section 238 and Section 239 of the Companies Act No. 17 of 2015 to continue a derivative suit on behalf of the 2nd Applicant, Fujian Shixin Investment and Developers [K] Limited, against the Respondent, a co-director and shareholder. The 1st Applicant alleged that the Respondent had engaged in acts and omissions detrimental to the company's interests, including diverting company funds to unknown accounts, initiating the transfer of Company-owned motor vehicles to his personal accounts, and conducting the company's affairs as if it were a private business. The Applicant further alleged that he had been denied access to the company's premises and financial records, thus justifying the need for interim injunctive orders and an application for leave to bring a derivative claim.
7. As part of the interim reliefs sought, the Applicants prayed for orders restraining the Respondent from selling, transferring, alienating, disposing of, removing, or otherwise dealing with the assets of the 2nd Applicant in any manner whatsoever. They also requested that certain motor vehicles belonging to the 2nd Applicant be taken to Ndeiya Police Station for safekeeping, pending the hearing and determination of the suit.
8. The basis of the Applicants' case was that the Respondent, who manages the day-to-day operations of the Company, had not only denied the 1st Applicant access to the Company and its operations but had also engaged in activities that were allegedly illegal and prejudicial to the interests of the Company and its shareholders. It was alleged that the Respondent had been diverting company funds to undisclosed accounts, had initiated the transfer of Company-owned motor vehicles to his personal control, and was essentially running the company as his private enterprise to the exclusion and detriment of the other shareholders.
9. On 7th March, 2025, the court directed that the application be served for inter-partes hearing. Upon reconvening on 26th March, 2025, and having considered the materials then placed before it then, the court granted interim orders restraining the Respondent from dealing with the assets of the Company and directed that specified motor vehicles be surrendered to Ndeiya Police Station for safekeeping.
10. These are the orders that have now become the subject of the Respondent's application dated 24th April, 2025, and which he contends are not only prejudicial to him but also detrimental to the Company's operations.

11. I have noted that in objecting to the current application, the Applicant raised the argument that the application by the Respondent is sub judice, while asserting that the issues raised therein are similar or intertwined with those in the earlier application dated 7th April, 2025, which remains undetermined. The Applicant/Respondent contends that until the court has ruled on that initial application, no subsequent related issues should be entertained.
12. However, this court is not persuaded that the doctrine of sub judice, as set out under Section 6 of the Civil Procedure Act, is applicable in the manner suggested by the Applicant. That section provides as follows: “No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction to grant the relief claimed.”
13. From a plain reading of the above Section, it is evident that sub judice applies where there are multiple suits in different courts and not in instances where multiple applications lie within the same cause and court, as is the case here. In this regard, the guiding principle is not a rigid bar but a prudential safeguard to avoid conflicting decisions and multiplicity of proceedings across courts of equal and competent jurisdiction.
14. The Court of Appeal in *Kenya National Commission on Human Rights v Attorney General; Independent Electoral and Boundaries Commission & 16 Others [Interested Parties]* [2020] eKLR clarified this principle as follows: “The purpose of the sub judice rule is to prevent courts of concurrent jurisdiction from simultaneously entertaining parallel proceedings in respect of the same subject matter, so as to avoid rendering conflicting decisions and to protect the integrity of the judicial process.”
15. The same view was echoed in the case of *Mombasa Cement Limited v Speaker, National Assembly & Another* [2018] eKLR, where the Court held: “Sub judice is not designed to shield a party from legitimate litigation in a matter that is already properly before the court. It does not prevent the court from exercising its inherent jurisdiction to deal with matters before it, even where interlocutory or successive applications are brought within the same cause.”
16. Consequently, the doctrine of sub judice does not bar this Court from considering the present application, as it arises from the same cause already properly before it. Moreover, this court retains full discretion to determine and manage the sequence in which it will hear and dispose of the applications pending before it, guided by the urgency, justice, and practical realities of each application.
17. Now, turning to the merits of the instant application in considering whether to set aside or vary the orders in question, this court is guided by the overarching legal principle that a derivative action is a unique remedy brought not for the personal benefit of the complainant shareholder, but in the best interests of the Company and its collective body of shareholders. The primary purpose of such an action is to protect the Company from harm that would be caused by the wrongful acts or omissions of those in control, and to preserve its assets and

viability as a going concern.

18. Therefore, in determining whether the injunctive orders issued herein should be maintained, varied, or set aside, the court must evaluate whether their effect promotes the continued business of the Company or, conversely, frustrates it. It must also assess whether the orders serve to preserve the substratum of the dispute or whether they risk being misused to settle personal grievances under the guise of protecting the Company.
19. It has become apparent from the materials now placed before this Court, and indeed from the oral submissions of both counsel, that there exists a long-standing dispute between the directors of the 2nd Applicant Company, which include allegations of fraud, mismanagement, and exclusion from the Company's affairs. These disputes were not brought to the court's attention with sufficient clarity at the time the orders of 26th March, 2025 were issued. Consequently, the court is now better placed to re-evaluate the impact and propriety of those orders in the wider context of corporate governance and the statutory obligation to preserve a company as a going concern during the pendency of a derivative suit.
20. This Court takes judicial notice that while injunctive relief may be necessary to prevent further dissipation of Company assets, it should not have the collateral effect of crippling the Company's operations, paralyzing its business, or rendering it incapable of performing its commercial functions. Doing so would be contrary to the fundamental principles underpinning derivative actions, which are meant to safeguard and not to destroy, the economic value of a Company.
21. This Court also reiterates that injunctive orders should never be wielded as instruments of personal vendetta or revenge between disputing directors or shareholders. Where there exists a reasonable apprehension that such orders may be misused in this way, the court must intervene to ensure equity, balance and the proper administration of justice.
22. Clearly, the injunctive orders issued on 26th March, 2025 had the unintended effect of crippling the operations of the 2nd Applicant Company and the Respondent has through his affidavits expressed the same. By restraining the Respondent from engaging in any dealings with the Company's assets and directing that certain motor vehicles, integral to the Company's logistical operations, be surrendered to Ndeiya Police Station, the court inadvertently hindered the company's ability to carry out its day-to-day activities.
23. Accordingly, and in exercise of its discretionary powers under the Civil Procedure Act and the inherent jurisdiction of a court, this court finds it necessary to vary the orders issued on 26th March, 2025 in order to preserve the company's operational capacity while protecting its assets and the subject matter of the dispute before it.
24. Consequently, the Notice of Motion application dated 24th April, 2025 is allowed with the following orders issuing:-a. That the Directors of the 2nd Applicant Company who were managing its affairs as at the time the orders of 26th March, 2025 were issued, shall continue

to manage its day-to-day operations, subject to the supervisory jurisdiction of this Court.b.That the said Directors shall keep proper and accurate records of all transactions, decisions, and dealings concerning the 2nd Applicant Company, including financial statements, asset registers, and board resolutions which shall be availed to the court on demand or as may be directed.c.That the Respondent is hereby restrained from transferring, alienating, disposing of, charging, or in any manner changing ownership of the assets of the 2nd Applicant company pending the hearing and determination of the substantive suit.d.That the order directing the delivery of the 2nd Applicant's motor vehicles to Ndeiya Police Station is hereby set aside and in place thereof, the court directs that the said motor vehicles shall remain in the lawful custody and operational control of the Company, but must not be sold, transferred, or otherwise alienated. Full and detailed records of the use and whereabouts of these motor vehicles shall be maintained and produced before the court upon request.e.Costs of the application shall be in the cause.It is so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 21ST DAY OF MAY, 2025. D. O. CHEPKWONYJUDGEIn the presence of:Mr. Rogers Alingo counsel for ApplicantsMr. Mukuna counsel for RespondentCourt Assistant - Martin

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