



**Chemaswet v Bonuke & 3 others; Muzdalifa Holdings Limited
& 2 others (Interested Parties) (Civil Case E070 of 2023)
[2024] KEHC 9203 (KLR) (Commercial and Tax) (30 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 9203 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE E070 OF 2023
JWW MONG'ARE, J
JULY 30, 2024**

BETWEEN

METRINE TEMKO CHEMASWET PLAINTIFF

AND

BENSON ONDARI BONUKE 1ST DEFENDANT

ABDIRAHIM MOHAMED ABDI 2ND DEFENDANT

KHADIJA SAID OMAR NADHIR 3RD DEFENDANT

EVEREST FRESH LIMITED 4TH DEFENDANT

AND

MUZDALIFA HOLDINGS LIMITED INTERESTED PARTY

ISINYA GROWERS AND POULTRY LIMITED INTERESTED PARTY

SAAD MIGDAD SAAD INTERESTED PARTY

RULING

Introduction and Background

1. On 23rd February 2023, the Plaintiff (“Metrine”) filed suit stating that she is a minority shareholder in the 4th Respondent (“the Company”) wherein she holds 10% of the shares and that she was bringing this proceedings pursuant to section 780 of the *Companies Act* (Chapter 486 of the Laws of Kenya) . She claimed that the Company’s affairs were being and had been conducted by the 1st Defendant (“Benson”), who is a majority shareholder, in a manner that was oppressive and is unfairly prejudicial to her interest. Metrine averred that the Company was incorporated on 2nd May 2012 with



two subscribers/shareholders; to wit; Benson and herself and that initially, Benson had been allotted 1,500 shares and Metrine had been allotted 500 shares which she still currently holds. She stated that the major objective of incorporating the Company was for purposes of carrying out agriculture, manufacturing and production of various fruit juices within the country and that the Company did obtain all the necessary permits for the same and a production plant was installed in industrial area. That the Company's fruit juice brand goes by the name Adam's Harvest.

2. Metrine claims that sometime in early 2022, her mother suffered a stroke while in her home at Kapenguria and she agreed with Benson that she goes to take care of her since there was nobody to take care of her mother. Metrine then left active management of the Company and avers that while at Kapenguria, she always followed up on the status of the Company and that Benson has been representing to her that all is going on well as far as the business of the Company is concerned. That on or about March 2022, Benson called for a board meeting, which was held virtually wherein he presented the only agenda and moved that the Company take some loan in order to expand its production. That Benson further stated that he had found some people who were willing to lend money to the Company on condition that they be made signatories to the Company's account, for purposes of monitoring the income of the Company generated from the sales until the loan amount was fully recovered.
3. Metrine proffers that after much deliberations, the agenda was passed in the best interest of the Company and a resolution to the effect that the said persons, now the 2nd and 3rd Defendants ("Abdirahim" and "Khadija") herein, who were willing to loan the Company were made signatories to the Company's account. Metrine now claims that Benson has kept her in the dark as to the amount that was loaned to the Company despite several demands though it was agreed that the Company was to borrow Kshs 9,000,000/= and be repaid with an interest of 10% within one year and that she is further unaware whether the said loan was deposited in the bank or not. It is her further claim that on or about late January 2023, when she came back to Nairobi and as she was going through the Company files and records, to her dismay, she realized that Benson had allotted himself the 3,000 unissued shares of the Company, which allotment was done without Metrine's knowledge and without following the laid down procedure in the Memorandum and Articles of Association of the Company.
4. Metrine further claims that she realized that Abdirahim and Khadija who were represented to her by Benson as people who were to advance a loan to the Company, had been incorporated into the Company as new shareholders in the guise of Benson selling his shares to them. That worse still, Metrine came across a resolution that had been purportedly signed by her for the transfer of the shares to Abdirahim and Khadija, but the signature therein clearly does not belong to her; the same being totally a different signature and signed by someone else. Metrine claims that this raised her eyebrows and when she asked Benson about the CR12 she found amongst the documents showing Abdirahim and Khadija as the Company's shareholders, Benson informed her that indeed he had sold his shares to them and that they are now the new shareholders who are active in managing the Company.
5. Metrine claims that this sale of shares was done without her knowledge and without following the due procedure and therefore pleads illegality and breach of the Company's Memorandum and Articles of Association for failure to give notice to the existing shareholders in light of Articles 13, 14, 31 and 32 of the Articles of Association of the Company for the allotment of unissued shares and the sale of shares; failure to follow the laid down procedure in the Memorandum and Articles of Association for sell and transfer of shares and; failure to follow the laid down procedure in the Memorandum and Articles of Association for the allotment of the unissued shares.
6. She pleads illegality on the Defendants' part for purporting to make a resolution for the sale of the shares for a board meeting that never happened, forging her signature in the purported resolution and



diverting the Company's business proceeds to personal accounts. For these reasons Metrine prays for judgment against the Defendants for; a declaration that the allotment of the unissued 3,000 shares in the Company to Benson was unlawful and contrary to the Company's Articles of Association hence null and void, a declaration that the transfer of the shares in the Company by Benson to Abdirahim and Khadija was unlawful and contrary to the Company's Articles of Association hence null and void, that the Registrar of Companies be directed to rectify the Company's record by cancelling the unlawful transfer of 2,500 shares to Abdirahim and Khadija, that the Registrar of Companies be directed to rectify the Company's records by cancelling the unlawful allotment of 3000 unissued shares to Benson, that a permanent injunction do issue restraining Abdirahim and Khadija whether by themselves, their employees, servants, agents, assigns or any other person acting on their instructions from in any manner whatsoever being involved in the affairs of and management of the Company and that an order be directed at the Defendants to return all the monies illegally diverted from the Company's business to their own accounts.

7. Contemporaneously with the plaint, Metrine has also filed the Notice of Motion dated 20.02.2023 made under sections 1A, 1B, 3A and 63(e) of the Civil Procedure Act (Chapter 21 of the Laws of Kenya), sections 780, 782, 786 and 789 of the Companies Act, Order 40 Rule 1 and Order 51 Rule 1 of the Civil Procedure Rules, 2010 ("the Rules") seeking the following orders:
 1. Spent
 2. Spent
 3. Spent
 4. Spent
 5. Pending the hearing and determination of the suit herein, a prohibitory injunction do issue restraining the Defendants/Respondents whether by themselves, their employees, servants, agents, assigns or any other person acting on their instructions from further diverting the income of the 4th Respondent to their personal accounts and further making any changes whatsoever in the 4th Respondent or in any other manner dealing with the 4th Respondent in a manner that might be detrimental to the interest of the Applicant
 6. Pending the hearing and determination of the suit herein, a prohibitory injunction do issue restraining the 2nd and 3rd Defendants/Respondents whether by themselves, their employees, servants, agents, assigns or any other person acting on their instructions from further being involved in the management of the 4th Respondent's affairs.
 7. The Respondents be compelled to make disclosure of the number of accounts, account numbers, Bank statements from April 2022 and the current cash balances. The disclosure do include the name(s) of the signatories of each of the Bank account.
 8. The Parties do agree on a reputable audit firm to be appointed by themselves to conduct an independent business review of the 4th Respondent from April 2022 to date and to prepare a report. If parties do not consent on the audit firm within 14 days, the Court be at liberty to appoint one. Costs of such audit shall be equally met by both the Applicant and the Respondents.
 9. The Court be at liberty to make such further orders as it deems fit
 10. The costs of this application be provided for



8. The application is supported by grounds on its face and the affidavits sworn by Metrine on 20th February 2023, 12th April 2023 and 2nd June 2023. It is opposed by Benson through his replying affidavit sworn on 05.06.2023; by Abdirahim, Khadija and the Company through the Notice of Preliminary Objection dated 8th March 2023 and the replying affidavit sworn by Khadija on the same date.
9. The Proposed Interested Parties have also filed the Chamber Summons dated 7th March 2023 that is made under Order 1 Rule 10(2) and Rule 25 of the Rules, section 3A of the *Civil Procedure Act* and section 11 and 72 of the *Interpretation and General Provisions Act*(Chapter 2 of the Laws of Kenya) where they essentially seek to be enjoined in this suit as interested parties and that they be granted leave to file a Defence and counterclaim and/or cross-claim. The application is supported by the grounds on its face and the supporting affidavit of the Proposed 3rd Interested Party sworn on 7th March 2023. It is opposed by Metrine through her Grounds of Opposition dated 13th March 2023 and by Benson and the Company through the Grounds of Opposition dated 15th March 2023.
10. Metrine’s and the Proposed Interested parties’ applications are the subject of the court’s determination. The applications have been argued and supplemented by way of written submissions that I have considered and will make relevant references to in my analysis and determination below.

Analysis and Determination

11. From the applications, responses and submissions, the court is being called to determine whether to grant the orders sought by Metrine and whether the proposed interested parties should be enjoined to this suit as interested parties. However, I propose to first deal with the Preliminary Objection as an affirmative determination may summarily dispose of Metrine’s application.
12. The Defendants state in the Objection that a suit on oppression and unfair prejudice brought under section 780 of the *Companies Act* ought to be filed by way of a Commercial Petition and not a Plaint and that in the circumstances, the Court’s jurisdiction has not been properly invoked and consequently, the suit filed herewith together with the Notice of Motion dated 20th February, 2023 ought to be struck out. In her response, Metrine depones that section 780 of the *Companies Act* has not expressly stated that a suit brought under that section should be commenced by way of a commercial petition as insinuated and that the section has only stated that the oppressed party may make an application to court if being oppressed by the majority shareholder.
13. Section 780 of the *Companies Act* provides in part as follows:
 780. Application to Court by company member for order under section 796
 - (1) A member of a company may apply to the Court by application for an order under section 782 on the ground—
 - a. that the company's affairs are being or have been conducted in a manner that is oppressive or is unfairly prejudicial to the interests of members generally or of some part of its members (including the applicant); or
 - b. that an actual or proposed act or omission of the company (including an act or omission on its behalf) is or would be oppressive or so prejudicial.
 - (2)
14. From the wording of the provision above, I am in agreement with Metrine that there is no express requirement that an application under section 780 must be by way of a commercial petition. Whereas



I note that the Defendants rely on this court's decision (Tuiyott J.,(as he was then)) in *John Muturi Nyaga v Graham Alexander Walsh & 3 others* [2017] eKLR to advance their position that such an application should ideally be by way of a petition, the learned judge in that decision also stated that "A Plaint may on occasion serve the same purpose as a Petition and vice versa" and that "What is important here is that the procedure provides an opportunity for specifying the Grounds of the oppressive conduct and/or unfair prejudice and of proving them through oral or affidavit evidence". The learned judge then went on to find that the said suit was properly before the court as a proper cause under section 780 of the *Companies Act* in as much as the same was filed by way of a plaint.

15. Likewise in this suit, it is my finding that even though Metrine has instituted the same by way of a plaint rather than a petition, she has specifically set out the grounds she chooses to rely on and which I have summarized in the introductory part and that she has sought to substantiate the same through affidavit evidence filed together with her Notice of Motion. No prejudice will indeed be occasioned on the Defendants as the cause of action against them is clear and understandable and that they are able to substantively respond to it. As such, Abdirahim's, Khadija's and the Company's Notice of Preliminary Objection dated 8th March 2023 has no merit and ought to be dismissed.
16. Turning to the substance of the applications, I will first deal with that of Metrine before dealing with that of the proposed interested parties. Metrine seeks injunctive reliefs against the Defendants restraining them from diverting the Company's funds and being involved in the management of the Company's affairs. She further seeks disclosure of accounts, account numbers and current cash balances and an independent audit of the Company from April 2022. On the injunction sought, Metrine has rightly submitted that she ought to satisfy the conditions set out in the precedent setting case of *Giella v Cassman Brown* [1973] EA 358. She ought to demonstrate that she has a *prima facie* case with a probability of success, demonstrate irreparable injury which cannot be compensated by an award of damages if a temporary injunction is not granted, and if the court is in doubt, show that the balance of convenience is in her favour. Additionally, these three conditions are to be applied as separate, distinct and logical hurdles which Metrine is expected to surmount sequentially (see *Nguruman Limited v Jane Bonde Nielsen and 2 others* NRB CA Civil Appeal No 77 of 2012 [2014] eKLR). This means that if she does not establish a *prima facie* case then irreparable injury and balance of convenience does not require consideration. On the other hand, if a *prima facie* case is established, then the court will consider the other conditions.
17. A *prima facie* case flows from what has been pleaded in the plaint. As stated in the introductory part, Metrine complains that the Company's shareholding has been altered and changed by Benson without her knowledge and against the Company's memorandum and articles of association and that her signature had been forged in the process. She further accused the Defendants of diverting the Company's business proceeds to personal accounts. In response, Benson deponed that he sold his own shares to Abdirahim and Khadija hence there was no need for a board discussion and resolution and that there was no need to involve Metrine in the transaction. Benson stated that he no longer involves himself in the management of the Company which is now being managed by Abdirahim and Khadija and that any issues raised can only be answered by them. However, he claims that no income has ever been paid into the Company's bank accounts and appears to agree with Metrine by stating that Abdirahim and Khadija unilaterally diverted all income into Khadija's bank account. Benson denies that there was a share purchase agreement for the purchase of 2000 shares as alleged by the 3rd Defendant in her response and that the stated amount of Kshs 9,000,000.00/= was the purchase price for the shares which amount has not been paid in full by Abdirahim and Khadija. He adds that the transfer of shares was conducted by Abdirahim's and Khadija's lawyers.



18. On their part, Abdirahim and Khadija claim that Metrine and Benson are husband and wife and have colluded in filing the suit herein and application, create a non-existent dispute between themselves in the hope of securing Orders, in an effort to circumvent compliance with a Demand Notice dated 13th February, 2023 served upon Benson by their Advocates, Rene & Hans LLP. They aver that the filing of this suit is a classic case of abuse of the Court process as in the Demand Notice, Khadija demanded that Benson renders a true and accurate account of his operation of the Company's Bank Accounts and to further, table evidence of all expenditure incurred by himself on behalf of the Company. She also demanded that Benson pays up the sum of Kshs 9,000,000.00/= which was consideration for his acquisition of shares in the Company, failing which the Company would initiate the process of calling up the shares held by Benson. Khadija claims that Benson acquired 2,000 ordinary shares in the Company vide a Share Purchase Agreement dated 5th April, 2022 executed between Khadija and Benson and that the consideration for the transfer of the said shares was agreed at Kshs 9,000,000.00/= That Benson failed to effect payment of the agreed consideration of Kshs 9,000,000.00/= and has at all times been falsely representing that he has a stock of Pulp in Mombasa for the production of juice, a fact which turned out to be false.
19. Abdirahim and Khadija deny that the Company was to be loaned the sum of Kshs 9,000,000.00/= and they reiterate that this sum was consideration under the Share Purchase Agreement which consideration Benson has to date, failed to pay up. Khadija depones that Metrine and Benson have never contributed even a shilling to the Company and that she has been financing the Company and still finances it to date. That there is completely no iota of evidence adduced by Metrine to support the allegations set out in the application and the Plaint and that it is Benson and Metrine who are colluding in violation of the director's duties under the *Companies Act* by conducting the affairs of the Company unprofessionally without involvement of the other Directors in decision making. That Benson has also, failed to attend the meetings of the Company despite having been severally invited to attend the meetings. Thus, Abdirahim and Khadija aver that Metrine has not laid any basis whether on the facts or in law, for the issuance of the orders she seeks in her application.
20. From the summary of the positions taken by the parties above, it is evident that as directors/ shareholders of the Company, they appear to be at loggerheads over the management and finances of the Company. However, it is not lost and as I have stated, that it is Metrine as the applicant, to make out a prima facie case if at all the court is to grant her equitable relief. From the documents annexed by Metrine more so the Company's CR 12, it is clear that the Company's shares initially held by Benson, that is 4500 shares were distributed to Abdirahim; 500 shares, Khadija; 2000 shares and Benson; 2000 shares and Metrine retained 500 shares. Metrine has also annexed a resolution dated 30th March 2022 whereby it was resolved that two signatories be added to the Company's bank account, that is, Khadija and the proposed 3rd Interested Party. She also annexed a resolution that effected the aforementioned changes in the shareholding of the Company but she denies ever attending the meeting leading up to the said resolution or that she signed the same.
21. Without appearing to discount Metrine's claim that her signature was forged or that she never attended the meeting that gave rise to the resolutions that effected the changes of the Company, it should not be lost that at this stage, the court can only make a prima facie finding whose conclusiveness will be determined at trial. The court cannot conduct a mini trial and make a conclusive finding based on the affidavit evidence before it. It is at the trial and main hearing stage that the parties can impeach the veracity and credibility of the documents on record. This position was fortified by the Court of Appeal in *Patrick Okuku & 7 others v James Kutsushi Atindo & 8 others* KSM CA Civil Appeal No 242 of 2011 [2016] eKLR where it was held that serious allegations of fraud and other wrong doing can only be decided during a proper trial and not on the basis of conflicting affidavit evidence. It is therefore my



- finding on a prima facie basis that Metrine was present in the meeting of 8th April 2022 where she agreed and it was resolved that Benson transfers his 500 shares to Abdirahim and 2,000 shares to Khadija and that Abdirahim and Khadija were to be appointed as directors and shareholders of the Company.
22. My findings above mean that Metrine has failed to demonstrate a prima facie case that the Defendants illegally, unprocedurally and without her knowledge transferred Benson's shares to Abdirahim and Khadija or that they are not supposed to be directors/shareholders of the Company. As directors and shareholders of the Company, the 2nd and 3rd Defendants cannot be restrained from participating in the Company's management and affairs. On whether the Defendants should be restrained from diverting Company funds into their personal accounts, Metrine annexed receipts she stated were issued by the proposed 1st Interested Party and were in respect of the Company's products. However, Metrine has not demonstrated that either of the Defendants diverted Company funds into their personal accounts for the court to restrain them from doing so. The said annexed receipts do not demonstrate any such diversion of the Company's funds into the Defendants' personal accounts. The court can also not stop any changes from being effected in the Company if its directors and shareholders so wish as the *Companies Act* is designed to permit the members of a company to manage their own affairs (See *In Re Garnets Mining Co Ltd* [1978]eKLR)
 23. My summation of the above findings is that Metrine's prayers for injunctive reliefs against the Defendants fail as she has failed to demonstrate a prima facie case against them. In line with the dicta in *Nguruman Limited v Jane Bonde Nielsen*(supra) her quest for an injunction comes to a grinding halt at this point.
 24. Turning to the other orders sought, that is disclosure of accounts, account numbers, Bank statements from April 2022 and the current cash balances and name(s) of the signatories of each of the Bank account, whereas I agree that as a director/shareholder Metrine is entitled to such information, I note that this is a request that should have been first directed to the Company. It is only after this request has been unreasonably denied and information unreasonably withheld that the court can intervene and compel the disclosure of the said documents and information. This prayer is therefore premature and ought to fail.
 25. On whether the court should order the parties to agree on a reputable audit firm to be appointed by themselves to conduct an independent business review of the Company from April 2022 to date and to prepare a report and that if parties do not consent on the audit firm within 14 days, then Court be at liberty to appoint one, I also find this request to be premature and without basis. While I agree that Metrine has a right to know the status of the affairs of the Company, there is no demonstration or evidence that this right has been thwarted by the Defendants (See *Re Nationwide Electrical Industries Limited* (2007) eKLR). The net effect of my findings above is that Metrine's Notice of Motion dated 20th February 2023 has no merit and ought to be dismissed in its entirety.
 26. Turning to the proposed interested parties' application for joinder, Order 1 Rule 10(2) of the Rules grants the Court discretion to order joinder of any party to a suit at any stage of the proceedings so long as the presence of that party before the Court is necessary in order to enable the court to effectually and completely adjudicate upon and settle all questions in dispute. In *Pravin Bowry v John Ward & another* NRB CA Civil Appeal No 70 of 2009 [2015] eKLR the Court of Appeal adopted with approval the decision in *Departed Asians Property Custodian Board v Jaffer Brothers Ltd* [1999] 1 E.A 55 (SCU) where the Supreme Court of Uganda observed that:

A clear distinction is called for between joining a party who ought to have been joined as a defendant and one whose presence before the court is necessary in order to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit. A



party may be joined in a suit because the party's presence is necessary in order to enable the court effectually and completely adjudicate upon and settle all questions involved in the cause or matter....

For a person to be joined on the ground that his presence in the suit is necessary for effectual and complete settlement of all questions in the suit one of two things has to be shown. Either it has to be shown that the orders which the plaintiff seeks in the suit, would legally affect the interests of that person, and that it is desirable, for avoidance of multiplicity of suits, to have such person joined so that he is bound by the decision of the court in that suit. Alternatively, a person qualifies (on an application of a defendant) to be joined as a co-defendant, where it is shown that the defendant cannot effectually set a defence he desires to set up unless that person is joined in it, or unless the order to be made is to bind that person.

27. The Supreme Court, in *Francis Kariuki Muruatetu & another v Republic & 4 others* SCK Petition No 16 of 2015 [2016] eKLR, stated as follows concerning joinder of interested parties:

- (i) Personal interest and/or stake that the party has in the matter must be set out in the application. The interest must be clearly identifiable and must be proximate enough to stand apart from anything that is nearly peripheral.
- (ii) The prejudice to be suffered by the intended interested party in case of non-joinder, must also be demonstrated to the satisfaction of the court. It must also be clearly outlined and not something remote.
- (iii) Lastly, a party must, in its application, set out the case and/or submissions it intends to make before the court, and demonstrate the relevance of those submissions. It should also demonstrate that these submissions are not merely a replica of what the other parties will be making before the court.

28. The proposed interested parties have stated that Metrine adversely mentions them in the Plaint and that their presence in this suit is therefore necessary in order to enable the Court to effectually and completely adjudicate upon and settle all questions involved in the suit. Whereas Metrine, Benson and the Company oppose the joinder of the interested parties, it is not in dispute and as I have highlighted above that Metrine accuses Khadija of being the shareholder of the proposed 1st Interested Party and that this company has been selling off the Company's products, receiving money and diverting the same into personal accounts. The proposed 3rd interested party is also mentioned as one of the people introduced as signatories to the Company's bank account. As such, I have no doubt that the proposed interested parties have an identifiable stake and interest in this proceedings and that their absence might prejudice them if adverse orders are made against them. In any event, I find that their presence will enable the court effectually and completely adjudicate upon and settle all questions involved in this suit including whether they diverted money from the Company and into their accounts and whether Khadija was working at cross-purposes against the interests of the Company. I urge the court to allow their application and that they be joined in this suit as interested parties.

Conclusion and Disposition

29. In the upshot, it is my finding that the Plaintiff's application dated 20th February 2023 lacks merit and ought to be dismissed in its entirety with costs to the Defendants which should be in the cause. The proposed interested parties' application dated 7th March 2023 succeeds and ought to be allowed but with no order as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 30TH DAY OF JULY, 2024.



.....

J.W.W. MONG'ARE

JUDGE

In the presence of:-

Mr. Mohammed for the Proposed 1st, 2nd & 3rd Interested Parties.

N/A for the Plaintiff.

N/A for the Defendants.

Amos - Court Assistant

