



REPUBLIC OF KENYA



**Cavenagh v Horsey & 2 others (Civil Case E013 of 2024)
[2024] KEHC 10364 (KLR) (22 August 2024) (Ruling)**

Neutral citation: [2024] KEHC 10364 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CIVIL CASE E013 OF 2024
SM GITHINJI, J
AUGUST 22, 2024**

BETWEEN

ALASTAIR MARK CAVENAGH PLAINTIFF

AND

CHRISTOPHER GORDON HORSEY 1ST RESPONDENT

DAVID HORSEY 2ND RESPONDENT

FIRST EUROPEAN FINANCE INVESTMENTS LIMITED 3RD RESPONDENT

RULING

1. For determination is a notice of motion application dated 1/7/2024, brought under sections 1A, 1B and 63 of the *Civil Procedure Act*; and Order 40 rules 1, 2 and 4 of the Civil Procedure Rules. The Plaintiff seeks the following orders: -
 1. Spent.
 2. Spent.
 3. That an order for accounts be taken to ascertain the amounts expended by the 1st and 2nd Respondents in acquiring shares held by the 3rd Respondent.
 4. That thereafter 2/9 of the shares in the companies held by the 3rd Respondent be transferred to the Applicant or to any entity of his choice.
 5. That alternatively, an order that all the shares of the 3rd Respondent in the companies be put up for sale by an estate agent appointed by the Court to be sold to the highest bidder.
 6. Spent.



7. That the court do grant any other orders it deems suitable and equitable under the circumstances.
 8. That the costs of this application be in the cause.
2. The application is supported by an affidavit sworn by the Applicant on 1/7/2024, and the grounds in support of the application are that the 3rd Respondent owns shares in some three companies namely Vipingo Ridge Limited, Vipingo Ridge Beach Limited and Sunsail Trading Company Limited (hereinafter “the Companies”), shares previously owned by one David Mitchell. That sometime in 2004, the Applicant and the said David Mitchell incorporated a company to acquire a property for purposes of developing a golf course (the project), which they did through the companies, and invited the 1st and 2nd Respondents as investors.
 3. Sometime down the line, dispute over management arose between David and the 1st and 2nd Respondents necessitating the Applicant to structure a transaction whereby David would sell his shares to the 3rd Respondent, as a special purpose vehicle, and without knowing the involvement of the 1st and 2nd Respondent in the 3rd Respondent company. In consideration for convincing David to sell his shares, the 1st and 2nd Respondent were to in turn finance and enable the Applicant to acquire 2/9 of the shares in the 3rd Respondent.
 4. The Applicant’s case was that upon transfer of shares from David to the 3rd Respondent, the 1st and 2nd Respondents have declined to transfer his shares as agreed. The Applicant alleged that the 1st and 2nd Respondents have continued to misuse their positions within the companies by terminating services of experts while replacing them with family members. The Applicant was apprehensive that unless restrained from dealing with the 3rd Respondent’s shares, the 1st and 2nd Respondents may put them out of reach of the Applicant and use them to the detriment of the Companies.
 5. The 1st and 2nd Respondents opposed the application. They filed a replying affidavit sworn on 16/7/2024 by David Horsey, the 2nd Respondent herein, who deposed that they initially invested United States Dollars two million (USD 2,000,000) in consideration of twenty percent (20%) shareholding in Vipingo Ridge Limited and Sunsail Limited in order to actualize the project. The 2nd Respondent stated that the transaction that is the subject of the Applicant’s grievance was indeed proposed by the Applicant sometime in the year 2017, on the basis that the said David Mitchell did not want to sell his shares (sale shares) to the 1st and 2nd Respondents.
 6. Subsequently, the Applicant forwarded to the 1st and 2nd Respondents the proposed terms of an agreement which according to the 2nd Respondent were that the 1st Respondent and himself were to retain one third of the Sale Shares and split any profit on the remaining two thirds of the Sale Shares amongst themselves and the Applicant, and after the deduction of costs and reasonable interest. He added that the Applicant’s only right was an economic right in the event of sale and that at no time was he to receive any shares as alleged in the application. He annexed copies of email correspondence between themselves and the Applicant. The emails are dated 12th December 2017, 2nd March 2018, 11th March 2018, 12th March 2018, 14th March 2018 and 20th March 2018.
 7. The final agreement between the Respondents and the Applicant dated 10th May 2018 was eventually executed and both parties agreed to the following terms: -
 - a. the 1st Respondent and I would finance the acquisition of the Sale Shares at the agreed price of United States Dollars six million (USD 6,000,000) payable in three (3) equal instalments over a period of twenty-four (24) months;



- b. the Applicant pledged to commit up to USD 1,000,000 towards the acquisition price of the Sale Shares in the event that the Companies refunded him a similar amount against his shareholder loans; -
 - c. the 1st Respondent and I would retain one third of the Sale Shares representing the first tranche payment;
 - d. the Applicant, the 1st Respondent and I would have the Sale Shares held in the 3rd Respondent until they are sold at which time any profit deriving from the sale of the remaining two thirds of the Sale Shares would be divided equally between us after deducting any costs related to the transaction that may have been incurred by us;
 - e. we did not intend to become majority shareholders in the Companies; and
 - f. we agreed the Applicant would remain as Chairman of the board of directors of the Companies until such time as the board would decide otherwise.
8. The 2nd Respondent asserted that the Applicant only agreed to receive a share of the profits arising from a future sale of two thirds of the Sale Shares, which sale transaction is yet to occur, hence that right was yet to crystalize.
9. Following the above agreement, the 1st and 2nd Respondents then entered into a loan agreement with the 3rd Respondent, in which the 1st and 2nd Respondents agreed to advance an amount of United States Dollars six million (USD 6,000,000/=) to be utilized towards the purchase of the Sale Shares. In turn, the 3rd Respondent and the Sellers later entered into three (3) share purchase agreements, all dated 17th July 2018, for the sale and purchase of the Sale Shares in the Companies. Later on 30th April 2020 the Applicant wrote to the 1st and 2nd Respondents stating that the sellers had agreed to a reduction of the third instalment amount of the Sale Shares to USD 1,000,000 which the Respondents ultimately paid. To the 2nd Respondent therefore, the Applicant did not at any point contribute to purchase of the sale shares, neither was there any agreement or deed of variation entitling him to shares.
10. In a further affidavit dated 22/7/2024, the Applicant exhibited correspondence dated 20/6/2021 for an alleged variation of the agreement, where the 1st and 2nd Respondents requested him to pay for 2/9 of the shares held by the 3rd Respondent, while the former were to hold 7/9 of the shares.

Disposition

11. The application was canvassed by way of written submissions. I have keenly considered the submissions by the parties and the authorities relied upon.
12. A cursory glance at the face of the application, the prayer sought is of an injunction and is interim in nature pending inter-partes hearing and determination of the application and thus can be said to be spent. There is no substantive prayer for injunction at this point for determination. I will therefore leave it at that. Remaining for determination is therefore Prayer Nos. 3, 4 and 5. Prayer 3 for an order for accounts to be taken to ascertain the amounts expended by the 1st and 2nd Respondents in acquiring shares held by the 3rd Respondent.
13. In my view, the prayer has no basis and is void of substance bearing in mind that this was clearly not an issue disputed by the Respondents. The 2nd Respondent indeed admitted under paragraph 28 of his replying affidavit that the purchase price was re-negotiated to USD 1,000,000/- less. I see no need to ascertain this, when the same was admitted.



14. In his plaint, the Applicant has sought reliefs akin to Prayer 4 and 5. These prayers are final in nature and can only be granted upon hearing the main suit. Granting them at this stage will, in my view, be determining the suit primarily or at an interlocutory stage before hearing to the evidence.
15. For the stated reasons, I dismiss the application dated 1/7/2024. The 1st and 2nd Respondent will have the costs.

RULING READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 22ND DAY OF AUGUST, 2024.

S.M. GITHINJI

JUDGE

In the Presence of; -

Mr Owuor Thatcher holding brief for James Singh for Plaintiff/Applicant

Mr Cecil Kuyo for 1st and 2nd Defendants

