



REPUBLIC OF KENYA



**Bargoria v Bargoria & 7 others (Commercial Case E475 of 2022)
[2023] KEHC 18660 (KLR) (Commercial and Tax) (26 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 18660 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E475 OF 2022**

DAS MAJANJA, J

MAY 26, 2023

BETWEEN

VICTOR KIPKEMEI BARGORIA PLAINTIFF

AND

DANIEL KIPTOO BARGORIA 1ST DEFENDANT

SIKWEI TARITA LIMITED 2ND DEFENDANT

TARITA TROCADERO LIMITED 3RD DEFENDANT

BANK OF AFRICA LIMITED 4TH DEFENDANT

REBECCA JEPKEMBOI BARGORIA 5TH DEFENDANT

DANIEL KIMUTAI BARGORIA 6TH DEFENDANT

HIGHLAND REGISTRARS 7TH DEFENDANT

BUSINESS REGISTRATION SERVICE 8TH DEFENDANT

RULING

1. The plaintiff, 1st and 6th defendants are the children of the late Barnabas Tuitok Bargoria (“the Deceased”) who died on November 14, 2020. The 5th defendant is his wife. The 2nd defendant (“STL”) was incorporated in 1984 with the Deceased and the 5th Defendant as the only shareholders and directors. Subsequent changes were made to its shareholding which are the subject of this suit. The 3rd defendant (“TTL”) was incorporated as a special purpose wholly owned subsidiary of STL in 2019 with STL holding 1000 shares.



2. The plaintiff has filed this suit accusing the defendants of fraudulent conduct in the affairs of STL and TTL. In addition to the Plaint dated November 28, 2023, the plaintiff has filed a notice of motion of the same date made, inter alia, under Order 40 rule 2 of the [Civil Procedure Rules](#) and section 782 of the [Companies Act](#), 2015. It is supported by the plaintiff's affidavit of the same date and a further affidavit sworn on March 16, 2023. The defendants oppose the application. The 1st defendant filed a replying affidavit on his own behalf and on behalf of STL and TTL sworn on January 23, 2023. The 5th and 6th defendants have filed their replying affidavits sworn on January 23, 2023. The 4th defendant ("the Bank") opposes the application through the replying affidavit sworn by its officer, Collins Bett, on January 24, 2023. The 8th defendant ("the BRS") opposes the application through the replying affidavit of Zacharia Mwangi, an Assistant Registrar of Companies, sworn on January 23, 2023.
3. The parties through their respective advocates filed written submissions supplemented by brief oral submissions.
4. The factual basis of the plaintiff's case is set out in the Plaint and his depositions. His case is that STL was incorporated with the deceased having 900 shares and the 5th defendant having 100 shares. The plaintiff and 6th defendant were later incorporated as directors. That unknown to him, the 1st defendant started filing returns through the 7th defendant ("HR") as the Company Secretary yet STL had never made changes to the position of the Company Secretary. That the 1st defendant fraudulently changed the structure of STL through backdating minutes purporting that a meeting held on February 2, 2011 allotted him 800 shares. The Plaintiff accuses the 1st defendant of forging the Deceased's signature purporting that he had been allotted 800 shares in 2011 when, in fact, the changes were made after 2016.
5. The plaintiff avers that on November 30, 2020, while the family was still mourning the Deceased's death, the 1st, 5th and 6th defendants held a meeting on November 30, 2020 without notifying him. That the 1st and 5th defendant purported to sign a resolution to be the sole signatories of STL's accounts held at the Bank. The plaintiff states that on December 12, 2021, the 1st defendant made changes to TTL where he removed the Deceased as director and made himself the sole director.
6. The plaintiff accuses the 1st defendant of manipulating records at the Companies Registry with the connivance of its officers to effect the fraudulent scheme to change the shareholding and directorship of STL and TTL with the intended result of diluting his shareholding. He points out that at all material times, HR acted as Company Secretary without any authorization. In addition, the Plaintiff accuses the 1st defendant of fraudulently exposing STL and TTL by making unauthorised borrowing from the Bank without his involvement and to the detriment of the companies.
7. As a result of the defendants' unauthorised and fraudulent conduct, the plaintiff seeks a raft of reliefs in the Plaint. They include a declaration that the changes in shareholding and directorship filed after March 2016 are fraudulent and ought to be set aside and the BRS be directed to rectify the company register for STL in order to restore the initial shareholding by removing the 1st defendant as shareholder, an injunction restraining the 1st, 4th and 5th defendants from withdrawing any amount from the company accounts domiciled at the Bank for any reason other than for settling existing liabilities and an order restraining the 1st and 7th defendants from acting as director and secretary of TTL or in any way changing its structure and shareholding. The plaintiff also seeks an injunction restraining 1st, 2nd, 4th and 5th defendants from charging, selling or in any way affecting the securities of the Land Parcel; Eldoret Municipality Block 7/340 registered in the name of TTL. In the application the Plaintiffs seeks injunctions along the lines set out in the Plaint.



8. As I have summarized above, the plaintiff's case is grounded on changes made to the shareholding and directorship of STL and TTL. The 1st, 2nd, 5th, 6th and 7th defendants deny the allegations of forgery and unauthorized changes to the shareholding structure of STL and TTL as alleged. Since the issues raised were raised by the Plaintiff through a complaint to the BRS, the BRS has also outlined the changes made to the shareholding and directorship of STL and TTL since the companies were incorporated. I will outline the chronology of events as narrated by the defendants since they take a common position.
9. STL was incorporated on April 8, 2004 with a share capital of Kshs. 100,000.00 comprising 1,000 ordinary shares of Ksh. 100 each. The Deceased and the 5th defendant held 100 shares each, leaving 800 shares unallotted. At the time, Bob Harry Mosi was the Company Secretary.
10. At a meeting held on February 2, 2011, the Deceased and the 5th defendant passed a resolution allotting 800 shares to the 1st defendant who they also appointed as a director of STL. They also appointed HR as Company Secretary in place of Bob Harry Mosi. In addition, they appointed the Plaintiff and 6th defendant as directors. The Companies Registry was duly notified of these changes by the filing of FORM 203A. A Return of Allotment being FORM 213 was also filed confirming that the 1st Defendant was allotted 800 ordinary shares. Based on the changes, the shareholding of STL is as follows; the estate of the Deceased 100 shares, the 1st defendant 800 shares and the 5th defendant 100 shares. The plaintiff and the 6th defendants do not hold any shares but are directors. According to the 5th defendant, these changes were to facilitate the development of Eldoret Municipality Block 7/162 which belonged to the Deceased and was transferred to STL.
11. TTL was incorporated on November 12, 2019 with a share capital of Kshs. 100,000.00 comprising 1,000 ordinary shares of Kshs. 100 shares each. All the 1000 shares are held by STL while the Deceased and the 1st defendant were the directors. The position in TTL has not changed.
12. Based on the contending facts regarding the shareholding and structure of STL and TTL, the question for resolution is whether the court should grant the orders of injunction sought in the application as follows:
 - (b) An order of injunction restraining the 1st, 4th and 5th defendants from executing or operating the 2nd defendant's accounts numbers (*****) at Bank of Africa, the 4th defendant or otherwise withdrawing from the same accounts except that the same is debiting regular settlement of a loan for an existing facility or in any other way diverting income from the 2nd defendant to their personal accounts or otherwise wasting the property of the 2nd defendant pending the hearing and determination of this suit.
 - (c) An order of injunction restraining the 1st and 7th defendants from operating or otherwise acting as director and secretary respectively of the 3rd Defendant or in any way affecting the operation of the 3rd defendant as a wholly owned subsidiary of the 2nd defendant or in any way affecting the shareholding structure or carrying out any business other than properly authorized by the company pending the hearing and determination of the suit.
 - (d) An order (of) injunction directed at the 1st, 2nd, 4th and 5th defendants restraining them from charging, further charging, selling or in any way effecting securities on the 2nd defendant's land parcel number Eldoret Municipality registered in the name of the 2nd defendant or in any way exposing the company properties to more debt or using them as securities for purported plants of the 1st defendant to build a multibillion property on the 2nd defendant's property pending hearing and determination of the suit.



13. In deciding whether to grant the injunctions sought, the court is guided by the decision in *Giella v Cassman Brown* [1973] EA 348. In order to succeed in an application for an interlocutory injunction order, a party must demonstrate that it 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 their favour. The court must apply these three conditions as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially as was held by the court of Appeal in *Nguruman Limited v Jane Bonde Nielsen and 2 others* NRB CA Civil Appeal No. 77 of 2012 [2014] eKLR. This means that if an applicant does not establish a prima facie case then irreparable injury and balance of convenience do not require consideration. On the other hand, if a prima facie case is established, the court will consider the other conditions.
14. The first hurdle the Plaintiff must surmount is to establish a prima facie case with a probability of success. The Court of Appeal in *Mrao Ltd v First American Bank of Kenya Limited and 2 others* [2003] eKLR explained that 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.” The prima facie case is determined on the basis of what is pleaded in the plaint.
15. The key question the court has to resolve is whether the 1st defendant colluded with the other shareholders to change the shareholding of STL to the detriment of the plaintiff. In resolving this issue, it must be recalled that while the court is not required to conduct a mini trial, it must however be satisfied that the plaintiff has made out a prima facie case. The plaintiff complains that the 1st defendant was never allotted 800 shares and that HR was not appointed as Company Secretary of STL. It alleges that the Deceased’s signature was forged in the purported allotment of shares.
16. In this case, the BRS has provided clear evidence on the shareholding of both STL and TTL. In this regard I agree with the decision in *China Young Engineering Company v L. G. Mwacharo T/A Mwacharo Associates and another* [2012] eKLR, that:

My view is, when there is a dispute as to directorship and shareholding of a company, the best evidence to be relied on is the updated records from the Registrar of Companies. The registry is meant to keep records of all Companies and for the purposes of the public to rely on the same as reflecting the true record of any particular company.
17. The documents produced by the BRS are thus prima facie evidence of the status of shareholding and directorship of STL and TTL. The Defendants have given a detailed account of how the shares were distributed appropriately corroborated by the duly filed returns and documents. The Plaintiff contends that when STL was incorporated, the deceased held 900 shares hence the 1st Defendant could not have been allocated 800 shares. The documents produced on behalf of BRS fully rebut this position.
18. I am not inclined to accept the Plaintiff’s allegations of fraud. The Plaintiff through its advocates, Limo and Njoroge Advocates, wrote to the Registrar of Companies a letter dated July 5, 2021 making the same allegations regarding the changes in shareholding, the filing of annual returns that contained alterations and issued relating thereto. BRS addressed a letter dated October 4, 2021 to all the parties, that is the shareholders and directors of STL, on the allegations raised by the plaintiff and requested them for comment. HR and STL responded by their letters dated October 13, 2021. All the responses were forwarded to the plaintiff’s advocates but they did not comment thereon. By a letter dated November 23, 2021, the BRS notified the parties that all the documents in relation to STL were regular



and there was nothing further to investigate. In my view, the plaintiff, having made serious allegations against the defendants and the BRS, did not follow up on the matter despite considering the matter serious enough to warrant a complaint.

19. Further and based on the established shareholding, the plaintiff on his own and while the Deceased was still alive, signed resolutions and provided a personal guarantee and indemnity required by the Bank as part of security for advances amounting to Kshs. 100,000,000.00 to STL in April 2016. At this time, the Plaintiff did not question the directorship and shareholding of the Company which was based on the resolutions made at the meeting he impugns. As the Defendants' point out, the Plaintiff did not contest the very minutes under which he was appointed a director. Indeed, if I were to accept his position, then he would not be a director and would have no standing in this matter.
20. From the totality of the evidence, I find and hold that the plaintiff has not made out a prima facie case with a probability of success that the defendants changed the shareholding and directorship of STL and TTL to his detriment. In the circumstances, the court cannot restrain the 1st, 5th and 6th defendants and also HR from acting as the directors and the Company Secretary of STL. At the plenary hearing of the application, counsel for the Plaintiff, conceded that the Plaintiff was not a shareholder and his claim was based on directorship of the company.
21. STL and TTL have raised the issue that the court cannot restrain them, at the behest of the plaintiff, from carrying on its business. They rely on the principle established in *Foss v Harbottle* [1843] 2 Hare 261 that the court will not, "interfere with the internal management of companies acting within their powers". The courts will only intervene if the acts complained of are ultra vires, of fraudulent character or cannot be rectified by ordinary resolution" (see *Re K Boat Service* [1998]eKLR, *Stephen Maina Kimanga and 4 others v Lucy Waitbira Mwangi and 2 others* [2014]eKLR). In this case, what the plaintiff seeks to restrain includes borrowing and expending funds to develop company property which are matters within the powers of the company. The borrowing and any business, even if it is ultra vires, can easily be ratified by the shareholders. I therefore hold that the plaintiff's plea to interfere with the activities of STL and TTL by way of injunctions is rejected.
22. The plaintiff admits that STL holds five accounts with the Bank. It is also not in dispute that the Bank has advanced certain facilities supported by securities including a guarantee and indemnity issued by the plaintiff in its favour. Ultimately, STL and the Bank are in a contractual relationship to which the Plaintiff is not privy. He cannot intervene in what is really an internal matter for the Company. His only relationship with the Bank is in respect of the securities he has issued and which are not in dispute.
23. Since the plaintiff has not established a prima facie case with a probability of success, in line with the dicta in *Nguruman Limited v Jane Bonde Nielsen and 2 others* (*supra*), the inquiry comes to an end.
24. The plaintiff's application November 28, 2022 is dismissed with costs to the defendants.

DATED AND DELIVERED AT NAIROBI THIS 26TH DAY OF MAY 2023.

D. S. MAJANJA

JUDGE

Court of Assistant: Mr M. Onyango

Ms Matoke instructed by Magare Musundi and Company Advocates for the Plaintiff.

Mr S. Omondi instructed by Ronn Law Advocates LLP for the 1st, 5th, 6th and 7th Defendants.

Mr Gacheru instructed by Murugu, Rigoro and Company Advocates for the 2nd and 3rd Defendants.

Mr Muchiri instructed by the Waweru Gatonye and Company Advocates for the 4th Defendant.



Mr Odhiambo instructed by the 8th Defendant.

