



REPUBLIC OF KENYA



KENYA LAW
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**Patel v Patel & another; Patel & 2 others (Interested Parties) (Petition
9 of 2022) [2022] KEHC 12542 (KLR) (2 August 2022) (Ruling)**

Neutral citation: [2022] KEHC 12542 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
PETITION 9 OF 2022
EKO OGOLA, J
AUGUST 2, 2022
IN THE MATTER OF R.M PATEL & PARTNERS LIMITED
IN THE MATTER OF THE APPLICATION UNDER
SECTIONS 780, 782, 786 AND 789 OF THE COMPANIES
ACT 2015**

BETWEEN

SANJEEV PATEL PETITIONER

AND

RAJENI M. PATEL RESPONDENT

AND

RM PATEL PARTNERS LIMITED NOMINAL RESPONDENT

AND

JAYESH RAJENI MANIBHAI PATEL INTERESTED PARTY

HIMESHI RAJENI PATEL INTERESTED PARTY

BANK OF BARODA (KENYA) LIMITED INTERESTED PARTY

RULING

1. The Notice of Motion application herein by the Petitioner dated 11/4/2022 prays for the following orders:
 1. Spent.
 2. Spent



3. This honourable Court be pleased to grant a temporary injunction restraining the Nominal Respondent including any of its directors from participating in, or convening the Extra ordinary General Meeting slated for 16th April, 2022 and any other subsequent meetings, for purposes of removing or consenting to the Applicant's removal as a director of the Nominal Respondent as well as the allotment and issuance of 331,000 ordinary shares of kshs.100, pending hearing and determination of the petition.
 4. The respondent and the Nominal Respondent be and are hereby directed to pay the Applicant his salary from the month of November 2021 to date.
 5. Pending hearing and determination of this application, the respondent and the Nominal Respondent be and are hereby directed to provide the Applicant with the following information;
 - a. Accurate accounts of the company from January 2020;
 - b. A reconciliation of all purchases made by the company from the period January 2018 to date or alternatively, copies of all the LPOs issued to or by the company for the period January 2018 to date;
 - c. All records for the Nairobi road showroom relating to the stock of new tractors, new implements, new barriers, new tyres, rims and tubes, oils and lubricants, used tractors, used combine harvesters and used implements and all internal and external job cards for the period 2005 to date; and all internal and external job card for the period 2005 to date; and
 - d. A full account of all purchases made by or on behalf of the company from or through Ashoka Diesel India;
 6. The Applicant be and is hereby granted leave to institute derivative action on behalf of the Nominal Respondent as against the respondent; and
 7. The costs of this application be borne by the respondent.
2. The motion is premised on the grounds set therein and is supported by affidavit of Sanjeev Patel filed herein on 12/4/2022.

The Applicant's Case

3. The Applicant's case is that he holds twenty (20) ordinary shares in the Nominal Respondent Company herein and has been a Director of the Company together with the Respondent since 1997. The Company's principal objective is importation and sale of farm implements, tractors, tractor spare parts and imports of farm inputs. The company also deals in procurement and sales of new batteries, tyres, rims, tubes, oils and lubricants.
4. The Company has one hundred (100) ordinary shares each valued at kshs.50,000/-. The nominal share capital of the company is kshs.5,000,000/-. The respondent holds eighty (80) ordinary shares while the Applicant holds twenty (20) ordinary shares. Based on the shareholding, the respondent is the majority shareholder while the Applicant is minority shareholder. However, the Applicant avers that they both have equal rights in the Company. Since 1997, the two of them have successfully managed the Company business. However, since 2019 there have been disagreements between the two directors which have negatively affected the smooth management of the company. The results of these disagreements have been *inter- a-lia* as follows: The Respondent has made unilateral decisions



with respect to the company. The Applicant has been denied access to company's financial accounts and information pertaining to the management of the company. The Respondent has issued various loans to employees without authorization from the Company's Board of Directors. The Respondent has transferred various company assets to Terra Agri Farms/Solutions Limited (Uganda), a Company the respondent allegedly owns together with his two sons without authorization from the Board of Directors and without the Company receiving consideration for the said assets. The Respondent has made supply of various tractors and implements to the said Terra Agri Farm, without the same being invoiced. The Respondent has denied the Applicant access of any information relating to the Company. The Applicant has been denied his salary and loan facilities, and is unable to pay school or university fees for his children. The Applicant has suffered oppression and frustration.

5. On 18/3/2022, the Respondent issued the Applicant with a Notice of Extra Ordinary General Meeting to be held on 16/4/2022 whose agenda was *inter-a-alia* to remove the Applicant as director of the company, and further to inject shareholders' funds prorata to their respective shareholding with a net effect of diluting the shares of the shareholders who may not inject any funds. The Applicant avers that the respondent is pursuing an unlawful and unfair advantage against him in his position as a controlling shareholder in the company.
6. The Applicant avers that the calling up for additional funds is as a result of pilferage of company assets and mismanagement of company funds and the additional funds are meant to cover up the pilferage and irregular transfer of the company's assets.
7. In view of the above the Applicant urges this Court to stop the envisaged meeting and to direct the respondent to provide him with all the documents listed in prayer 5 (a) – (d) of this Motion. The Applicant also seeks leave to file derivative proceedings under section 238 of the [Companies Act](#).

Exparte Order

8. The application was heard *exparte* under Certificate of Urgency pursuant to which temporary conservative orders were issued to the Applicant in terms of prayer no.2 as follows:
 1. A grant of temporary injunction be and is hereby issued restraining the respondent from calling for, participating in, or convening the Extra Ordinary General Meeting of the Nominal Respondent slated for 16th April, 2022 and any other subsequent meetings, for purposes of removing or consenting to the Applicant's removal as a director of the Nominal respondent as well as the allotment and issuance of 531,000/- ordinary shares of kshs.100 pending the hearing of this application interpartes.
 2. The application be served for hearing interpartes on 25/4/2022.

Response

9. The application is opposed by the respondent *vide* a replying affidavit sworn by Rajeni M. Patel on 22/4/2020. The respondent's case is that being a member and director of the company, he is non-suited hence the application herein is grossly incompetent and lacks merit and should be dismissed. The respondent states that as a member and director of the company he has no authority or capacity to unilaterally remove the Applicant as a director. That can only be done by the company through its general meeting.
10. More substantively, the respondent avers that contrary to what is stated by the Applicant that him and the Applicant are the only shareholders of the Company, there are two other shareholders being Himesh Rajeni Patel with four (4) ordinary shares, and Jayesh Rajeni Manibhai Patel with three (3)



ordinary shares, and that it is noteworthy that the Respondent has the least shares in the Company being, one (1) ordinary share whilst the Applicant has two (2) ordinary shares. In view of the above, the Respondent believes that the Applicant herein availed to the Court an old Company's search done in January 2020 with a view to deliberately mislead or mispresent to this Court that the Respondent is still the majority shareholder of the Company and that there are only two shareholders of the Company. This was intended to falsely portray the Respondent as a majority shareholder and hoodwink the court into granting the *ex parte* interim orders that it gave on 14/4/2022.

11. The Respondent states that according to the Company's Articles of Association, the quorum for the general meeting is at least two (2) members, and that the notice inviting the members for the meeting made it clear that the meeting would not be held unless the quorum of two members was present. As such, if the Applicant's contention is that there were only two members of the Company, then, all that he needed to do was not to attend the meeting and the meeting would automatically collapse for lack of quorum. In the premises, the Respondent believes that by the Applicant coming to the court after undue delay to apply for a restraining order, despite having received the notice of the meeting, on 18th March 2022, he was aware that there are other members of the Company who would constitute quorum and yet he misled and misrepresented to this court that the Respondent is a majority shareholder of the Company in order to obtain a temporary injunction.
12. Further, as a director of the Company, the Respondent stated that he is aware that the procedure for removal of one as a director of a Company is set out under the *Companies Act*, 2015 and there is no complaint made by the Applicant that the procedure for consideration of the proposed resolution for his removal as a director of the general meeting has been violated or threatened to be violated.
13. The Respondent stated that on 17/3/2022, as a director of the Company, he received a notice questioning for a general meeting of the Company for purposes of considering seven (7) resolutions proposed by him as a member. As is required of him as a director of the Company, on 18th March 2022, he issued notice of the meeting to all members of the Company as requested and outlined the various proposed resolutions for consideration at the meeting.
14. Since one of the proposed resolutions for consideration by the members of the Company involved the removal of the Applicant as a director, the Respondent as a director of the Company further issued a special notice to the Applicant as required by the law and invited him to exercise his right of protest by making representations in writing, on or before the 9/4/2022 for consideration by the members at the general meeting.
15. Despite issuing a special notice to the Applicant, the Respondent states that he is aware that the Applicant did not make any representations against the proposed resolution for his removal either by 9/4/2022 or at all. Further, the Applicant, as member of the Company, did (and has) not raised any complaint regarding the regularity of the meeting or any of the proposed resolutions.
16. The Respondent further avers that sometime in 2014 the Applicant, as a director, was entrusted with full control of the management of the Company. In this role, he was expected to manage the Company's business in good faith and to act in its best interest. However in November 2020, the Applicant left the country to the United Kingdom where he stayed for almost a year. As such, the Respondent had to take over the daily operations and management of the Company's business. Whilst doing this, the Respondent discovered that the Applicant had mismanaged the affairs of the Company, misappropriated its funds, and left the Company in a precarious financial situation. Consequently, the Respondent brought this to the attention of the Applicant and requested the Applicant to among other things, return to work at the Company premises and account for the loss of the funds. However, whilst acknowledging some of the allegations, the Applicant refuted the other allegations. After



- the Applicant returned to the country in August 2021, he through his advocates, made wild and unsubstantiated allegations against the Respondent as a director of the Company and threatened to move to the Court to remove the Respondent as a director of the Company; and to petition for the winding up of the Company and take a derivative action against the Respondent.
17. The Applicant demanded, among others, that the Company holds a Shareholders' Annual General Meeting every calendar year and he should be invited. The Respondent refuted the allegations and reminded the Applicant that he was free, as a director, to call for a board meeting. The Respondent found it paradoxical that whereas the Applicant in 2021 demanded that the Company holds a general meeting, he has approached this court to stop or restrain the company from holding a general meeting.
 18. The Respondent stated that during the time that he had effective management of the Company, after the Applicant left in November 2020, he received various accounts, from both former and current employees of the Applicant's wanton mismanagement and misappropriation of the Company funds; that although the Respondent returned to the country in August 2021, he did not resume his work as he been requested and instead resorted to issuing threats and intimidations to Company employees through his advocates. All the while, the Applicant did not table before the Company's board any complaints levelled against the employees. This had a very negative impact on the morale and performance of the employees with the result that the operations of the Company have been affected.
 19. The Respondent further stated that he is aware that the Applicant having abandoned his work now works at a competitor company, Agritrac Solutions Limited, established through his wife, Heena Mansunkhlal Purohit, where he runs the daily affairs of the said Company. Indeed, it is unsurprising, that the Applicant's current postal address of P. O. Box 801-30100, Eldoret, as stated in his supporting affidavit to the application herein is the same as the registered postal address of the said Agric Solutions Limited.
 20. The Respondent further denies all allegations by the Applicant of mismanagement of the company, fraud; embezzlement and misuse of funds; oppressing the Applicant; unilateral decisions; denial of access to company's financial accounts; and transfer of company property.
 21. The respondent avers that the application is brought in bad faith and malice and is premised on false documentation and is meant to halt the business of the company and should be dismissed with costs.
 22. Further the respondent avers that these proceedings document grievances of member qua member and not in any other capacity as a director or an employee of the company. To that extent the Applicant's complainants relate either to his directorship or employment and are therefore devoid of any merit and should be dismissed.

Rejoinder

23. The Applicant filed a rejoinder as further affidavit on 25/4/2022 mainly restating the averments in the supporting affidavit and deposing that the reason for calling for a capital injection of kshs.51,300,000/- is because the respondent has looted the company to its knees by supplying goods to Terra Agri Farms/solutions, which have never been paid for; that in any case the company has always been in a profit making position and it is alarming that it cannot settle its liabilities with the various banking institutions.



Submissions

24. The application was canvassed via written submissions. The Applicant filed submissions on 17/6/2022 while the Respondent filed submissions on 20/6/2022. I have carefully considered the said submissions and the application and response to it. In my view there are only two issues for determination viz:
- i) Whether the application has met the threshold for grant of injunction.
 - ii) Whether leave should issue to the Applicant to institute derivative action on behalf of the nominal Respondent.

Determination

Whether Injunction should issue

25. The Petitioner and the Respondent are shareholders in and directors of the Nominal Respondent. The petitioner moved this Court with the current application under a certificate of urgency seeking ex parte urgent orders to stop the Nominal Respondent from holding an Extra Ordinary General Meeting with a view of removing the petitioner as director and the issuance of an additional 531,000 ordinary shares by the Nominal respondent. The Petitioner further seeks leave from this Court to institute a derivative suit on behalf of the Nominal Respondent herein. The court after hearing the Petitioner's/Applicant's application ex-parte in chambers on 14th April 2022, allowed orders restraining the Respondent/Applicant herein from calling for, participating in, or convening the Extra Ordinary General Meeting of the Nominal respondent which was scheduled on 16th April 2022, or any other subsequent meetings as a director to the nominal respondent as well as the allotment and issuance of 531,000/- ordinary shares of kshs.100 each pending the hearing and determination of the application.
26. An order of injunction is an equitable discretionary order granted to an eligible Applicant who comes to court in honesty and in good faith. In the instant matter, and looking at the pleadings herein, it is not difficult for the Court to draw a conclusion that the Applicant and the Respondent having both originated the company, have in the course of time grown apart to the detriment of the company. It is alleged by the Respondent, and the allegation is not refuted by the Applicant, that in the year 2020 and 2021 or thereabouts the Applicant absconded from his duties in the company and travelled abroad; it is also alleged and not denied by the Applicant, that the Applicant founded a company called Agitrac Solutions, managed by his wife. The said company is in direct competition with the nominal Respondent herein. The Applicant, on the other hand alleges an array of wrongs allegedly done to the nominal Respondent Company. These include alleged mismanagement, failure to account for supplies; sale of tractors and parts to Terra Agri Farms/Solution Limited (Uganda) without invoicing.
27. It is therefore clear that the two directors of the nominal Respondent herein, are not seeing eye to eye, causing lapses in the management of the company. This has led into a stalemate which is now threatening to destroy the nominal Respondent Company herein.
28. The Applicant filed a search on the Company records dated 22/1/2020 which shows that the Applicant and the Respondent are the two directors and shareholders of the company, and that therefore the Company General Meeting which was to be held on 16/4/2022 and which intended to increase the share capital of the company would be oppressing him. In my view, and as correctly put by the Respondent, if the correct CR.12 is as per the search dated January 22, 2020, then the Applicant had the option not to attend the general meeting by withdrawing his presence to deny the



meeting quorum. Article 11 of the Memorandum and Articles of Association of the company provides as follows:

“No business shall be transacted at any general meeting unless a quorum of members is present at the time when the meeting proceeds to business... two members present in person shall be a quorum.”

29. However, the above position appears not to be the correct position. The Respondent in his replying affidavit, attached a search at the Companies Registry dated 23/2/2022. The search shows that there are five (5) directors/shareholders of the company. According to that search, the Applicant owns two (2) shares. While the Respondent owns one (1) share, making the Respondent the minority shareholder. It is indeed this occurrence that caused the interested parties herein to seek to be enjoined to these proceedings to protect their interest they being the other directors/shareholders of the Company.
30. Although the Applicant has disowned the said search, my view is that the search is an official document from the office of Registrar of Companies and its authenticity cannot be doubted without the due process in the full trial. That being so, it is evident that the Respondent and the Appellant are not the only shareholders/directors of the company herein. That also means that the Appellant obtained conservatory orders of injunction here on 14/4/2022 without complete disclosure of material information. It is my finding that the Applicant failed to provide all the necessary information, and that the order of injunction was premised on half truths.
31. Further, the apparent disagreement and stalemate between the Applicant and the Respondent should not be allowed to stall the operations of the company herein.
32. By a ruling delivered herein on 28/7/2022, the Interested Parties were enjoined to this suit. They are shareholders and directors of the company and any orders issued against the company may affect their rights. As such those orders which were obtained without material disclosure cannot remain.
33. For the foregoing reasons, I find and hold that this Court has no reason to stop the company from carrying out its lawful mandate pursuant to its Memorandum and Articles of Association.

Whether leave should issue to Applicant to institute a derivative action

34. The fundamental rule is that a derivative action is a reserved right under the *Companies Act* which seeks to balance the rule of majority shareholders in the running of the affairs of a Company. The Court has the duty of a gatekeeper to ensure that minority shareholders do not abuse derivative rights by instituting unnecessary and unmerited applications for leave, especially in the cases where they do so purely based on the displeasure of the resolutions validly passed or proposed by the majority shareholders of a company. The *Companies Act* has clothed this court with powers and discretion to analyse and sieve applications for leave to institute derivative actions by minority shareholders of a company under sections 238 – 241 of the Act. Sections 238 and 239 of the Act provide that an Applicant for leave to institute a derivative action must at least establish a *prima facie* case on any cause of action he believes has harmed the company and the directors or the majority shareholders have refused to act or have prevented the company from taking an action to protect the Company’s rights or interests. The Court has the onus of determining whether the permission ought to be granted to avoid frivolous and unmerited applications for leave to institute and derivative suit.



35. In *Gbelani Metals Limited & 3 Others v Elesb Gbelani Natwaral & Another* [2017] Eklr, the Court described derivative suits in the following words;

“Derivative actions are the pillars of corporate litigation. As I understand it, a derivative action are the pillars of corporate litigation. As I understand it, a derivative action is a mechanism which allows shareholder(s) to litigate on behalf of the corporation often against an insider (whether a director, majority shareholder or other officer) or a third party, whose action has allegedly injured the corporation. The action is designed as a tool of accountability to ensure redress is obtained against all wrongdoers, in the form of a representative suit filed by a shareholder on behalf of a corporation”.

36. The Applicant avers that with the respondent at the helm of the management of the company, there have been significant lapses in corporate governance, mismanagement of company funds and unimaginable pilferage of company assets. It is submitted that the only way to address the situation is by this court allowing the Applicant to institute a derivative suit. See *Dadan vs Manji & 3 Others*, 92004 1 KLR as cited in the celebrated case of *Sanjiv v Gbelani Enterprises Limited & 2 Others* (Civil Suit No.416 of 2017) [2021] KEHC 83 (KLR) (Commercial and Tax) (16 September 2021) (Judgment) as follows:

“...if due to an illegality a shareholder perceives that the company is put to loss and damage but cannot bring an action for relief in its own name, such a shareholder can bring an action by way of a derivative suit.”

37. In the same spirit, the Court in *Mahesh Meghji Shah vs Jewel Holdings Limited & 2 Others* [2017] eKLR held thus;

“In the instant matter, the Applicant has not only alleged fraud, but has also taken issue with matters relating to statutory compliance by the company, including a complaint that his personal interests are in jeopardy, granted his contention that no meetings have been called by the directors as expected. The letters marked MMS5 per the Applicant’s supporting affidavit confirm that the Applicant has indeed been requesting for details of annual returns for the last ten years as well as Minutes of the Companies’ Annual General Meetings and details pertaining to the Company’s assets and liabilities but that these have not been forthcoming. Accordingly, I am satisfied that he has established that he falls within exceptions (c) and (d) above and is therefore entitled to leave to file a derivative suit as sought. (Emphasis ours).

38. In my view, an application for leave to institute a derivative action should merely raise prima facie issues as to why the leave should be granted, noting that the grant of leave is not proof of the allegations. Once a shareholder has given good reasons why leave should issue, the leave should be granted to enable the Applicant elaborate these issues at the trial, noting that the end beneficiary is always the company.

39. The Applicant has raised issues of fraud; misallocation of the company funds; supplies made without invoicing; non payment of the company loans, among others. Nobody can raise these issues for the company. Should they turn out to be legitimate complaints, the company would be the loser.

40. For this reason, I believe the Applicant has demonstrated that he deserves the leave of the Court to bring a derivative action on behalf of the Nominal Respondent company herein. The same is granted.



Orders

41. Pursuant to the foregoing provisions of this ruling, I make the following orders:

- i) The conservatory injunctive orders issued herein on 14/4/2022 are hereby lifted and vacated.
- ii) The petitioner/Applicant is granted the leave of this Court to commence a derivative action on behalf of the nominal respondent company herein.
- iii) Parties shall each bear their own costs of the motion.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 2ND OF AUGUST 2022.

E. K. OGOLA

JUDGE

