

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D. S. MAJANJA J.

CIVIL CASE NO. E868 OF 2020

IN THE MATTER OF

IN THE MATTER OF THE COMPANIES ACT, 2015

AND

RECTIFICATION OF THE COMPANY REGISTER

AND IN THE MATTER OF

DANDORA MILLERS LIMITED

BETWEEN

MONICAH WANGUI NJENGA 1ST APPLICANT

DAVID KINYANJUI MATHU..... 2ND APPLICANT

AND

DAVID KINYANJUI NJENGA 1ST RESPONDENT

DANDORA MILLERS LIMITED 2ND RESPONDENT

EMU REGISTRARS.....3RD RESPONDENT

REGISTRAR OF COMPANIES 4TH RESPONDENT

RULING

Introduction

1. The Applicants have moved the court by an Originating Notice of Motion dated 17th July 2020 seeking the rectification of the register of Dandora Millers Limited (“the Company”) under **sections 863 and 864** of the **Companies Act, No. 17 of 2015** (“the **Companies Act**”). The application seeks the following reliefs:

[a] This application be certified as urgent.

*[b] This Honorable Court be pleased to issue an order directing forthwith the rectification of the register of **DANDORA MILLERS LIMITED (INCORPORATION NO. C. 28713)** in the following manner:*

- i. The nominal share capital of **DANDORA MILLERS LIMITED** be rectified to Kshs. 500,000*
- ii. The shareholding of **DANDORA MILLERS LIMITED** be rectified as hereunder;*

<i>NAME</i>	<i>POSITION</i>	<i>SHARES</i>
<i>DAVID KINYANJUI MATHU</i>	<i>SHAREHOLDER/ DIRECTOR</i>	<i>100</i>
<i>Estate of the late Njenga</i>	<i>SHAREHOLDER</i>	<i>150</i>

<i>Mathu</i>		
MONICAH WANGUI NJENGA	DIRECTOR/ SHAREHOLDER	150
DAVID KINYANJUI NJENGA	DIRECTOR/ SHAREHOLDER	100

[c] Costs of the application be provided for.

2. The application is grounded on the supporting affidavits of Monicah Wangui Njenga and David Kinyanjui Mathu sworn on 17th July 2020 and the further affidavit of Monica Wangui Njenga sworn on 21st October 2020. The application is opposed by the 1st and 2nd Respondents (“the Respondents”) through the Notice of Preliminary Objection dated 14th August 2020 and the replying affidavit of Davis Kinyanjui Njenga sworn on 4th August 2020. The 3rd and 4th Respondent did not participate in the proceeding as it appears their role in the subject was nominal.

3. The matter was canvassed through written submissions. Before I deal with the issues in contention, I will set out the respective parties’ factual contentions in order to provide context to the application.

Applicant’s Case

4. The Applicants’ case is that the Company was previously incorporated as Dandora Millers Limited and registered on 6th December 1984 with the following as initial subscribers: Njenga Mathu, Monicah Wangui, George Mathu and David Kinyanjui Njenga each with one share.

5. Sometime in 1984, the members of the Company at the Annual General Meeting increased the shareholding of the Company to 500 shares of Kshs. 1,000 each making the nominal share capital Kshs. 500,000 as follows;

NAME	POSITION	SHARES
GEORGE MATHU	SHAREHOLDER	100
NJENGA MATHU	SHAREHOLDER	150
MONICAH WANGUI NJENGA	DIRECTOR/SHAREHOLDER	150
DAVID KINYANJUI NJENGA	DIRECTOR/SHAREHOLDER	100

6. George Mathu passed away on 15th August 1998 while Njenga Mathu passed away on 18th August 2011 whereupon their shareholding passed to their respective estates. According to the Applicants, the shareholding and nominal share capital of the Company remained intact as no changes were sanctioned. Following the death of Njenga Mathu, David Kinyanjui Njenga has been involved in running the Company.

7. In May 2019, the Applicants learnt that the 3rd Respondent, the Company Secretary, had filed the Company’s annual returns from the year 2004 showing that David Kinyanjui Njenga was the majority shareholder of the Company with 3,100 shares and that the nominal share capital had increased to Kshs. 5,000,000.00. This position was confirmed by the certificate of search issued by the 4th Respondent dated 14th May 2019.

8. The Applicants complained that the changes in the Company shareholding structure were effected without the involvement of the shareholders and directors and in particular *no directors’ or shareholders’ meeting was ever convened to discuss the allotment of new shares in the Company, no directors’ or shareholders’ meeting was ever convened to discuss an increase in the share capital of the Company and no directors’ or shareholders’ resolution was ever passed to authorize an increase in the share capital of the Company.*

9. The Applicants lament that their demands to the Respondents have gone unanswered. They depone that David Kinyanjui Njenga called a special meeting of the Company on 30th March 2020 where he intended to, inter alia, discuss a buyout of other shareholders. They also learnt that he was in conflict with his duties as a director of DANDORA MILLERS LIMITED as he had incorporated a parallel company, DANMILLS COMPANY LIMITED, where he is the sole director and shareholder. They aver that DANMILLS is the name of the single largest animal feed product processed and sold by **DANDORA MILLERS LIMITED** as well as the name of flour for human consumption.

10. The Applicants therefore pray that the court order the Registrar of Companies to restore the shareholding structure and nominal share capital of the Company as prayed and that the court appoint an investigator to establish how the changes complained of were orchestrated by David Kinyanjui Njenga.

1st and 2nd Respondent’s Case

11. The 1st Respondent states that at all material times, the 1st Applicant was a director of the Company. She attended, along with other directors, the meeting held on 25th May 2004 which resolved to increase the shares and allocate him 3,100 shares. After the resolution was passed, the notice and special/ordinary resolution was signed by James Njenga Mathu, now deceased, who was the Company Chairman. He stated that the 1st Applicant has all along known of the changes in the Company share and capital structure.

12. The 1st Respondent denies the allegation of conflict of interest and states that DANMILLS COMPANY LIMITED is an independent legal entity and does not deal with any products and the business of the Company.

13. The 1st Respondent also states that the 2nd Applicant is a director of the Company as he was appointed by the 1st Applicant in dubious circumstances contrary to the Articles of Association. He states that the issue is now the subject to a pending suit; **Nakuru HCCC No. 27 of 2020 Davis Njenga Kinyanjui, Njemoni Limited and Dandora Millers Limited v Monica Wangui Njenga, Frecia Wanjilu Gathogo, David Kinyanjui Mathu, Joyce Nyambura Njenga and Registrar of Companies.**

Matters in issue

14. From the facts I have set out above, there are two broad issues for resolution. First, whether the 1st Respondent, through fraudulent means, increased the Company's shares from 500 shares to 5,000 and allocated himself 3,100 shares. Second, whether the 1st Respondent breached his fiduciary duties to the Company by incorporating another company which is in direct competition with the Company.

Determination

15. I think the second issue can be disposed of summarily. It is trite law that a director owes a fiduciary duty to the Company. He must act in good faith, in the best interests of the Company and for the proper purpose. This duty is owed to the Company and thus only the Company can complain of and sue for any breach of director's fiduciary duties (see **Ajay Shah v Deposit Protection Fund Board as Liquidator of Trust Bank Limited (In Liquidation)** NRB CA Civil Appeal No. 158 of 2013 [2016] eKLR, **Nyandarua Progressive Agencies Limited v Cyrus Wahome Nduhiu and Another** NYR CA Civil Appeal No. 213 of 2013 [2017] eKLR).

16. It follows that the Applicants' complaint against the 1st Respondent based on conflict of interest and breach of directors' duties cannot succeed quite apart from the fact that it is brought in a matter in which the Applicants seek to rectify the register.

17. As part of its Preliminary Objection, Counsel for the Respondents contends that the application is incompetent as it was brought as an Originating Notice of Motion which is a pleading unknown either under the **Companies Act** or the **Civil Procedure Rules**. Counsel submits that under the **section 863** of the **Companies Act**, the Registrar can only remove an entry once the court has declared the entry to be invalid hence the Applicants ought to have moved the court for declaratory relief and that such relief can only be granted after evidence has been taken and the parties cross-examined.

18. Counsel submits that the error in the manner of instituting these proceedings is fundamental and cannot be cured by **Article 159(2)(d)** of the Constitution as it not a mere technicality. To support this argument, counsel cited several decisions among them **Civicon Limited v Fuji Electric Company Limited and Another** HC COMM Arb. Cause No. 002 of 2020 [2020] eKLR, **Proto Energy Limited v Hashi Energy Limited** HC COMM Misc. E180 of 2018 [2019] eKLR and **Scope Telematics International Sales Limited v Stoic Company Limited and Another** NRB CA Civil Appeal No. 285 of 2015 [2017] eKLR.

19. The Applicants rebuff the Respondents' contention that the application is incompetent. Counsel for the Applicants submits that the application is competent under the **Companies Act (Repealed)** and **Rule 7** of the **Companies High Court Rules, 1964** and the prescribed procedure has been saved and carried forward by reason of **section 1024** of the **Companies Act**. Counsel referred to other cases where the court has adjudicated the issue of rectification brought by way of an Originating Notice of Motion for example in **Simon Horner v Michael John Mwaura and 3 Others** HC COMM Misc. No. 393 of 2017 [2018] eKLR. He urges that based on the facts presented, this is a case that ought to be decided summarily and allowed.

20. The issue for resolution concerns the rectification of the Company Register to reflect the original shareholding of the Company. The Applicants invoke **sections 863** and **864** of the **Companies Act**. While **section 864** is consequential, **section 863** thereof provides as follows:

863. (1) *The Registrar shall remove from the Register any entry-*

(a) that derives from anything that the Court has declared invalid or ineffective, or to have been done without the authority of the company; or

(b) that the Court has declared factually inaccurate; or to be derived from something that is factually inaccurate or is forged, and that the Court has directed to be removed from the Register.

(2) The Court shall specify in the order the entry that is to be removed from the Register and indicate where in the Register it is to be found.

(3) The Court may not make an order for the removal from the Register of any entry the registration of which had legal consequences as mentioned in section 861(3) unless it is satisfied –

(a) that the presence of the entry in the Register has caused, or may cause, damage to the company concerned; and

(b) that the company's interest in removing the entry outweighs the interest (if any) of other persons in the continued appearance of the entry in the Register.

(4) If, in such a case, the Court makes an order for removal, it may make such consequential orders as appear just with respect to the legal effect (if any) to be accorded to the entry because it has appeared in the Register.

(5) The Court shall ensure that a copy of its order is sent to the Registrar for registration.

(6) This section does not apply in respect of any entry in the Register if the Court has other specific powers under this Act to deal with the matter. [Emphasis mine]

21. A reading of **section 863(1)** aforesaid, shows that the Court has power to issue an order directing the Registrar to rectify any entry in the register. The use of the words, "*the Court has declared*" suggests that the court may make the declaration in an ordinary action instituted by the aggrieved party and if the case succeeds then the court may issue an order directing the Registrar to rectify the register. I say so because, the provision is a departure from **section 118** of the **Companies Act (Repealed)** which made special provision for an application for rectification in the following terms:

118. (1) If—

(a) the name of any person is, without sufficient cause, entered in or omitted from the register of members of a company; or

(b) default is made or unnecessary delay takes place in entering on the register the fact of any person having ceased to be a member, the person aggrieved, or any member of the company, or the company, may apply to the court for the rectification of the register.

(2) Where an application is made under this section, the court may either refuse the application or may order rectification of the register and payment by the company of any damages sustained by any party aggrieved.

(3) On an application under this section the court may decide any question relating to the title of any person who is a party to the application to have his name entered in or omitted from the register, whether the question arises between members or alleged members, or between members or alleged members on the one hand and the company on the other hand, and generally may decide any question necessary or expedient to be decided for rectification of the register.

(4) In the case of a company required by this Act to send a list of its members to the registrar, the court, when making an order for rectification of the register shall by its order direct notice of the rectification to be given to the registrar.

22. The procedure for such an application was set out in **Rule 7** of the then existing **Companies (High Court) Rules, 1964** which provided that:

Applications to rectify the Register of members of a company under Section 118 of the Act shall be by Originating Motion or when the Company is in voluntary liquidation by Summons.

23. The preponderance of authority under the **Companies Act (Repealed)** was that although the court has broad power to order rectification, this jurisdiction was summary in nature and not intended for determination of complex cases. In **Suryakant Bhailabhi Patel and 2 others v Moses Sekenya Kulundu and 4 others** ML HC MISC. APPL. No. 467 of 2014 [2014] eKLR, the court summarized the position as follows;

*Therefore, the first consideration in the exercise of discretion under section 118 of the Companies Act is; the procedure is a summary process and should be invoked only in clearest of cases. See the case of **Prab Hualal Tejpa Haria & Another -vs- Pravin Chandra Meghji Dodhia & 2 others** [2007] eKLR, where Warsame J (as he then was) expressed himself that;*

In my view the summary powers of the court can be invoked in plain and clear cases where there is no need for a trial.....The powers under section 118 of the Company's Act cannot be invoked when there is a real and complicated dispute as to the real interests of the parties.

24. The key issue in this matter is whether the 1st Respondent forged the minutes of the meeting held on 25th May 2004 and the Statement of Increase of Nominal Capital lodged by the 3rd Respondent at the Companies Registry and signed by the deceased Chairman. I hold that the issues of fraud and forgery should, in light of the provisions of **section 863(1)** of the **Companies Act**, be tried in a suit instituted for that purpose.

25. The Respondents issued a Notice of Preliminary Objection assailing the application on the ground that it is barred under the **Limitation of Actions Act (Chapter 22 of the Laws of Kenya)** and that the Applicants do not have *locus standi* to make the claim which belongs to the Company. Having taken the position that the application is incompetent, I cannot proceed to determine the issues raised by the Respondent.

Disposition

26. I have come to the conclusion that this is not a proper case to be determined summarily. In any case, **section 863(1)** of the **Companies Act** contemplates that the aggrieved party would file a normal action for determination rather than an application as was contemplated under **section 118** of the **Companies Act (Repealed)**.

27. I therefore strike out the Originating Notice of Motion dated 17th July 2020 with costs to the 1st and 2nd Respondents.

DATED and DELIVERED at NAIROBI this 18th day of JANUARY 2021.

D. S. MAJANJA

JUDGE

Court of Assistant: Mr M. Onyango

Mr Ondieki instructed by Gicheru and Company Advocates for the Applicants.

Mr Githui instructed by Githui and Company Advocates for the 1st and 2nd Respondents.