



IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D. S. MAJANJA J.

MISC. CIVIL APPLICATION NO. E1249 OF 2020

IN THE MATTER OF

IN THE MATTER OF THE COMPANIES ACT, 2015

AND

RECTIFICATION OF THE COMPANY REGISTER

BETWEEN

JACKSON KING'ORI.....1ST APPLICANT

DOMINIC MWAURA.....2ND APPLICANT

KENNETH NGUGI.....3RD APPLICANT

AND

ROBERT MWANGI NDERITU.....1ST RESPONDENT

DIGITAL LUXURY TRAVELLERS LIMITED.....2ND RESPONDENT

AND

THE REGISTRAR OF COMPANIES.....INTERESTED PARTY

RULING

Introduction and Background

1. The Applicants have moved the court by a Notice of Motion dated 27th November 2020 primarily under **sections 3, 103 and 863** of the **Companies Act, No.17 of 2015** (“the **Companies Act**”) and **Rule 7** of the **Companies (High Court) Rules, 1964** seeking the following main relief that:

An Order compelling the Interested Party to rectify the 2nd Respondent’s Register of Members to remove the 1st Respondent as a Shareholder of Ten (10) Ordinary Shares and replace him with the Self-Help Group.

2. The Applicants also seek injunctions against 1st Respondent restraining him from dealing with the 2nd Respondent’s shares, general damages, special damages of KES. 30,000.00 being the amount of dividends paid to the 1st Respondent by the 2nd Respondent (“the Company”). Because the issue of rectification is central to this determination, I do not propose to deal with the other reliefs for reasons that will become apparent.

3. The application is supported by the affidavits of Jackson King’ori, the 1st applicant, sworn on 27th November 2020 and 17th February 2021

respectively. It is opposed by the 1st Respondent through his replying affidavit sworn on 8th January 2021 and by the Company through the replying affidavits of Patrick Njoroge Kimani, the Company's co-director and shareholder, sworn on 3rd February 2021 and Allan Kariuki Kamau, the Company's Secretary and a shareholder sworn on 15th February 2021.

4. The basic facts of the case are common ground. The Applicants are the current co-registered officials of a Self-Help Group known as *Kathinyemu Self Help Group* ("the Self-Help Group") which is duly registered under the Ministry of Gender, Children and Social development under Registration Number DGSD/WD/5/4/2010/46. The Self-Help Group invests and has interests in, among others, public transport business and allied businesses and is the proprietor of the Motor Vehicle Registration Number KCB 503S ("the suit motor vehicle").

5. The Company is a private limited liability company that invests in, and has interests, in among others public transport and allied businesses while the 1st Respondent is a member of the Self- Help Group serving in the capacity of Chairperson and also a director/shareholder in the Company.

The Applicants' Case

6. The Applicants seek an order for rectification of the Company's register of members to remove the 1st Respondent who is registered as an ordinary shareholder of 10 shares which they claim belong to the Self-Help Group. They state that on 4th November 2015, the Self-Help Group appointed the 1st Respondent as its proxy and proposed him for appointment as Director of the Company in order to champion the interests of the Self-Help Group within the Company. In the same communication, the Self-Help Group informed the Company that it would forward a list of the Self-Help Group's serving officials to be registered as shareholders of the Company for and on behalf of the Self-Help Group. That it sent the list on the 6th November 2015 which the Company acknowledged and agreed to comply with the request.

7. In order to participate in the Company, the Self Help Group delivered the suit motor vehicle to the Company in order to formalize the allotment and or share transfer to the officials of the Self-Help Group by the Company as required by the Company's rules. However, instead of the shares being allocated to the Self-Help Group, the shares were allotted to the 1st Respondent as a result of misrepresentation, concealment of facts by the 1st Respondent and or though fraudulent and/or illicit collusion between the Company and the 1st Respondent.

8. The Applicants contend that as a result of the 1st Respondent's conduct, the Self Help Group is not a member of the Company despite making substantial monetary contributions to the Company. They also accuse the 1st Respondent of enjoying all the benefits accruing from the shareholding in Company including receiving dividends despite the fact that the shares belong to the Self-Help Group.

9. The Applicants contend that within the *Companies Act, 2015* and regulations made thereunder, the 1st Respondent cannot be compelled by the Self-Help Group or the Company to surrender and/or transfer the shares in the Company belonging to the Self Help Group which has left the Self-Help Group to seek relief from this court.

The 1st Respondent's Reply

10. The 1st Respondent contends that the Company is in the business of managing PSVs and therefore the transfer of possession, control and management of the suit motor vehicle to the Company was not a fulfilment or sole requirement to become shareholders of the Company as claimed by the Applicants. The 1st Respondent denies that he was acting as a proxy of the Self Help Group and states that he used the proper procedure required of an individual to join the Company and that he became a director in his own capacity.

11. The 1st Respondent states that according to the letter by the Company dated 17th March 2018, the suit motor vehicle was withdrawn from the Company by the Self Help Group and delivered to Citytram Sacco even before it could be registered by NTSA. In the circumstances he urges that the Self Help Group could not be registered as a member of the Company as it had already sought membership of Citytram Sacco using the suit motor vehicle. The 1st Respondent adds that the Self Help Group admitted, in the letter dated 23rd March 2018, that its membership with the Company had not been effected by the time it received the letter dated 17th March 2018 and that they instead handed over the suit motor vehicle to Citytram Sacco hence it could not be a member of the Company without the suit motor vehicle which was a mandatory requirement.

12. The 1st Respondent submits that he cannot be compelled by the Self Help Group or the Company to surrender and or transfer his shares in the Company. He states that membership of the Self Help Group with the Company is disputed. He depones that the Applicants have not stated when the registration with the NTSA was effected and when they took back the suit motor vehicle from Citytram Sacco. In his view, the membership of the Company by the Self Help Group was not actualized hence it is not entitled to dividends. He maintains that the suit motor vehicle is yet to be returned to the Company.

13. The 1st Respondent maintains that he has been registered as the rightful shareholder and he is therefore entitled to all the benefits of a shareholder in the Company.

The Company's Reply

14. The Company confirms that the Self-Help Group is the registered proprietor of the suit motor vehicle which it brought to the Company's management and also paid the amount necessary for it to be registered. Having complied with the two conditions, the Company invited the Self Help Group to send its details of officials for purposes of registration as members in the Company which the Self Help Group did by its letter dated 6th November, 2020.

15. The Company states that the Self Help Group had earlier on nominated the 1st Respondent as its proxy to be registered as director in the Company for purposes of representation. It contends that from the record, it would appear that the 10 ordinary shares now held by the 1st Respondent were supposed to be allotted to the Self Help Group. The Company states that since the 1st Respondent was the proxy/medium between the Company and Self Help Group, his representation was taken without contest and shortly after presentation of the letter dated 6th November 2020, the 1st Respondent informed the Company that the Self Help Group had appointed him as the sole shareholder on behalf of the Self Help Group and that this breakdown of communication is what led to the present status. The Company acknowledges that the true ownership of the contested ordinary shares leans in favour of the Self Help Group and that the Company cannot force and/or compel the 1st Respondent to execute share-transfer forms in favour of the Self Help Group.

16. The Company confirms that the 1st Respondent has been receiving annual dividends as a shareholder of the Company. It submits that it would be unjust and unfair to demand the dividends paid to the 1st Respondent as a result of an innocent mistake following a breakdown of communication between the parties as it believed that the dividends would be paid to the Self Help Group through the 1st Respondent as its appointed proxy.

17. The Company submits that save for the prayer for rectification of the Company's Register of Members, the prayers for special damages and general damages in the application cannot be granted as the jurisdiction of the court under **sections 103 and 863 of the Companies Act and Rule 7 of the Companies (High Court) Rules, 1964** are specific on context, extent and purpose of that jurisdiction. The Company therefore submits that Applicants should pursue special and general damages in ordinary civil proceedings.

Analysis and Determination

18. From the facts I have summarized, the basic dispute is between the Self Help Group represented by the Applicants, supported by the Company, and the 1st Respondent is about the 10 ordinary shares in the Company. The Applicants seek an order to rectify the Company's Register of Members to remove the name of the 1st Respondent as shareholder and replace him with the Self Group as shareholder of the Company. They invoke **sections 863 of the Companies Act** which 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]

19. 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 general principle under which the court acts in ordering rectification of the register emerging from cases under the **Companies Act (Repealed)** is that although the court has broad power to order rectification, this jurisdiction is 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 Hulal 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.

20. I think resolution of this matter turns on the nature and legal standing of the Self-Help Group. The Certificate annexed to the Applicant's application states that the Self-Help Group was registered on 2nd March 2010 with the office of the District Gender & Social Development Officer (DGSDO). In ***Kipsiwo Community Self Help Group v Attorney General And 6 Others ELD ELC Petition No. 9 of 2013 [2013] eKLR***, the court dealt with the legal capacity of Self Help groups and held as follows:

[41] It is clear that Self- Help Groups are not incorporated bodies. In fact I know of no law that recognizes them or incorporates them. They were probably the brain-child of administrators who at times had to come up with a tool to identify specific groups of people that needed assistance, or needed to undertake projects together. They seem to have helped harness resources at community level. The only problem is that the Government has not put in place any legal framework under which they can be registered and managed. Such groups, in absence of a legal framework, indeed stand the risk of being declared unlawful societies as held in the case of Dennis Olooihero.

[42] Self Help Groups having no legal personality, cannot therefore institute proceedings in their own name.

(Also see ***Football Kenya Federation v Kenyan Premier League Limited & 4 others NRB Civil Suit No. 69 of 2015 [2015] eKLR***)

21. The court above, cited the decision in ***Kituo Cha Sheria v John Ndirangu Kariuki & Another NRB Election Petition No. 8 of 2013 (2013) eKLR*** where the court observed that such unincorporated entities can only maintain an action through its officials or such persons nominated by its board. The fact that the Self-Help Group is not a recognized juridical or legal person means that no rights, interests or such orders can accrue or be granted to it. That is to say, even if the Applicants' application were to be successful, the court cannot grant an order in favour of the Self-Help Group since it cannot own shares in its name. Such rights, interests or orders can only be vested upon the individual membership in the Self-Help Group or trustees appointed by the members. I did not hear the Applicants seeking orders on favour of the individual members in the Self-Group.

22. Finally, the substance of the dispute is whether the 1st Respondent holds the 10 ordinary shares in the Company in trust for members of the Self Help Group. Rectification proceedings under **section 863** of the ***Companies Act*** are inappropriate for resolution of this kind of issues. Further, and as pointed out by the Respondents, the court cannot grant reliefs such as injunctions and damages under this provision. In ***Monicah Wangui Njenga and Another v David Kinyanjui Njenga and 3 Others HC COMM Misc. E868 of 2020 [2021] eKLR***, the court on, on this issue, observed that:

[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.....

23. I therefore find and hold that on the whole, these proceedings are inappropriate for the resolution of the dispute between the Self-Help Group and the 1st Respondent. The civil court in resolving the dispute may issue appropriate orders and direct the Registrar to rectify the Company register of members accordingly without further proceedings.

Disposition

24. In conclusion and for the reasons I have stated above, the Notice of Motion dated 27th November 2020 is struck out. In view of the nature of the relationship between the parties, I make no orders as to costs.

DATED AND DELIVERED AT NAIROBI THIS 30TH DAY OF APRIL 2021.

D. S. MAJANJA

JUDGE

Court of Assistant: Mr M. Onyango

Mr Thuku instructed by C. M. Thuku and Company Advocates for the Applicant

Ogowe and Associates Advocates for the 1st Respondent.

Okenyo Omwansa and Company Advocates for the 2nd Respondent.

Mr Odhiambo, Advocate instructed by the Office of the Attorney General for the Registrar of Companies.