



REPUBLIC OF KENYA

IN THE HIGH COURT

AT MACHAKOS

(Coram: Odunga, J)

PETITION NO. 13 OF 2020

IN THE MATTER OF NGONG MATONYOK WHOLESALERS LIMITED

AND

IN THE MATTER OF CONTRAVENTION OF RIGHTS AND FUNDAMENTAL FREEDOMS

UNDER ARTICLES 22, 27 (1) & (2), AND 40 (2)(A) OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF THE COMPANIES ACT NO. 17 OF 2015, PART XXIX

PROTECTION OF MEMBERS AGAINST OPPRESSIVE AND PREJUDICIAL CONDUCT

AND

IN THE MATTER OF SECTIONS 780 AND 782 OF THE COMPANIES ACT NO. 17 OF 2015

BETWEEN

MARTIN LEMAIYAN MOKOOSIO.....1ST PETITIONER

EMMANUEL TOYANKA MOKOOSIO.....2ND PETITIONER

VERSUS

RESHMA PRAFUL CHANDRA VADERA.....1ST RESPONDENT

SIMON JOSEPH OLE KARASHA.....2ND RESPONDENT

BINDU KUMAR CHHOTALAL VADERA.....3RD RESPONDENT

NGONG MATONYOK WHOLESALERS LTD.....4TH RESPONDENT

RULING

1. The facts of this petition, according to the Petitioners are that the Petitioners are step-brothers whose father, the late **John Watenga Mokoosio** was among the three first shareholders and directors of the 4th Respondent when it was incorporated in 1968. The said deceased died on 31st July 1982 and was survived by his two spouses, **Penina Siamata** and **Florence Ngendo Mokoosio** and their respective Children. The initial Grant and Certificate of confirmation Grant was issued in the names of both wives, **Penina Siamata Mokoosio** and **Florence Ngendo Mokoosio** as co-administrators. The 1st and the 2nd Petitioner are the children of **Penina Siamata Mokoosio** and **Florence Ngendo Mokoosio** respectively.

2. According to the petition, the 4th Respondent Company is a major Distributor of Alcohol/beer for Kenya Breweries Limited/East Africa Breweries Limited within Karen, Dagorreti Corner, Wangige, Mwimuto, Kikuyu, Kabete, Ngong Town, and Magadi.

3. Pursuant to the Certificate of Confirmation of Grant dated rectified on 2nd November, 2018, the shares owned by the Petitioners' father in the 4th Respondent totalling 18,000 ordinary shares or 30% of the issued and paid up ordinary shares of the Company were transmitted equally by operation of the law to the Petitioners to hold for their respective houses though the 1st Petitioner is the only son in his house.

4. Pursuant thereto, on 20th December 2018, the Petitioners through their Advocates forwarded certified copies of the Grant and the certificate of confirmation of Grant to the Respondents' Advocates requesting for the transfer of shares and dividends held in the name of the Estate of the late **John Mokoosio** to the Petitioners. The said letter attached certified copies of the Petitioners' Identity cards and KRA PIN certificates to facilitate the transfer process and the letter further requested for share transfer forms and other requisite documents for the Petitioners' signatures. The letter further gave a bank account for purposes of payments of dividends due and owing to the estate of the **Late John Watenga Mokoosio**.

5. According to the Petitioners, since the shareholding of the 4th Respondent is made up of three families and each family is entitled have a Director in the company, the Petitioners also requested the Respondents to appoint them as Directors to be able to participate in the affairs of the 4th Respondent, a request that has not been addressed by the Respondents. It was pleaded that since the Petitioner's father died in 1982, only the late **Penina Siamata Mokoosio** has been appointed as a Director of the Company until her death in the year 1995.

6. It was pleaded that despite several further letters and emails by the Petitioners and their Advocates to the Respondents requesting for the transfer of shares to them to be effected and for the dividend due and owing to the estate of their late father, the Respondents have failed, neglected and refused to effect the transfer of shares, to issue share certificates or to pay the outstanding dividends. According to the petition, the Respondents only forwarded the share transfer forms to the Petitioners' advocates on 7th March, 2020 but have declined to forward the draft minutes showing that the Petitioners' will be appointed as directors of the Company contemporaneously with the transfer of shares given that their family is entitled to have director (s) under Article 38 of the Articles of Association of the Company as is the case with the other two families.

7. The Petitioners complained that since the death of **Penina Siamata Mokoosio** in the year 1995, the Estate of their late father has not received any annual dividends due and owing to them as per Articles 32 and 47 of the Articles of Association of the Company and neither have they received any Directors report regarding the company and in particular a report regarding dividends as required under Section 654 (4) of the **Companies Act**. The Petitioners have only been receiving a monthly payment of KShs. 60,000.00 (Kshs. 30,000.00 each) the purpose of which has never been explained to the Petitioners and when an explanation was sought, the Respondents purported to be monthly dividends and immediately stopped the payment to the Petitioners. As a result, the Petitioners are unable to account for this money for tax purposes.

8. According to the petitioners, since 1995 when late **Penina Siamata Mokoosio** died, the Company has not held any annual general and if any such annual general meeting has been held, then the Estate of their late father has not never received notice convening such a meeting contrary to Articles 30 and 31 of the Articles of Association of the Company and Sections 114 (3) (d) and 275 of the **Companies Act**. According to the Petitioners, current directors of the Company have been irregularly and unprocedurally been appointing and removing auditors and company secretaries of the company without involving the Petitioners yet they have no such powers under the Articles of Association of the Company and this offends Section 717 of the **Companies Act** regarding appointment and removal of auditors of the Company.

9. The Petitioners averred that despite several demands, the Respondents have failed, neglected and refused to furnish the Petitioners with the company's annual financial statement and reports for the years 2013-2019 thereby violating the Petitioners right as members under Section 114 (3) (g) of the **Companies Act**. Further, the Respondents have completely shut out the Petitioners from all the affairs of the 4th Respondent and they have not been involved in the affairs of the company a situation which is unfair and prejudicial to their interests as members of the 4th Defendant. This action also amounts to discrimination against the estate of **John Wetanga Mokoosio** given that the other two families fully participate in the affairs of the Company.

10. It was pleaded that the Respondents have been procuring loan facilities without the knowledge of the Petitioners who are shareholders and that the Company search (CR12) shows that on 26th February, 2019 the 4th Respondent took a loan facility of Kshs. 26,100,000/-. Despite the Company doing well financially, the Respondents have failed to pay the Petitioners any dividends yet the financial statements for the years 2016, 2017 and 2018 shows that for those three years the Directors were paid emoluments of Kshs. 18,660,000/-, Kshs. 18,761,216/- and Kshs. 26,614,190 respectively while the 4th Respondent made profits of KSHs. 5,584,340/-, Kshs. 13,135,631/- and Kshs. 13269,678/- respectively.

11. The Petitioners averred that the acquisition of 1,350 shares in the 4th Respondent by **Reshma Praful Chandra Vadera** the 1st Respondent herein and her subsequent appointment as a Managing Director without an annual general meeting is questionable given that the Estate of her father, **Pratulchandra Vithaldas Vadera** is still ongoing. The said Estate, it was pleaded is only entitled to have one (1) shareholder as per the Memorandum and Articles of Association of the 4th Respondent yet they currently have two (2) shareholders in violation of the Memorandum and Articles of Association of the 4th Respondent.

12. The Petitioners lamented that the Respondents' failure to effect the transfer of shares to the Petitioners, failure to accord an opportunity to the Petitioners to be directors and failure to pay the outstanding dividends is oppressive and is unfairly prejudicial to the interests of the Petitioners as it relates to the company.

13. In view of the foregoing, this Court was urged to afford the Petitioner's redress for violation of their Rights that have been infringed such as right of equality and freedom from discrimination by depriving the Petitioners their right to have a Director in the Board of the 4th

Respondent yet all the other families have representatives; unlawfully depriving the Petitioners' their right to property by denying them their rightful dues as dividends from the 4th Respondent; and that the 1st to 3rd Respondents are conducting the affairs of the 4th Respondent as a personal property to the exclusion of the Petitioners and in a manner that is oppressive and to the unfair prejudice of the Petitioners.

14. In their petition, the petitioners therefore seek the following orders:

- 1. A Declaration that the Respondents have violated and/or infringed the rights and fundamental freedoms of the Petitioners 22, 27 (1) & (2) and 40 (2)(a) enshrined in the Constitution of Kenya, 2010.**
- 2. A Declaration that the 4th Respondent's affairs are being conducted in a manner that is oppressive and unfairly prejudicial to the interests of the Petitioners.**
- 3. That the court be pleased to appoint one or more competent inspectors under Section 786 of the Companies Act court to investigate the affairs of a company and to report on those affairs in such manner as the Court directs.**
- 4. The inspection in (3) above to included investigation as to the legality of the transfer of 1,350 shares in the 4th Respondent to Reshma Praful Chandra Vadera and her subsequent appointment as a Director.**
- 5. An order compelling the Directors of the 4th Respondents to furnish the Petitioners with certified copies of all bank statements 2013 to 2019 and the audited financial statements/accounts of the 4th Respondent's for the years 2013, 2014, 2015 and 2019.**
- 6. An order compelling the Directors of the 4th Respondent to undertake forensic audit of the 4th Respondent's books of accounts for the years 2013 to 2019 by a reputable independent audit firm failing which the Court be pleased to allow the Petitioners to appoint forensic auditors at the Respondents' cost.**
- 7. An order compelling the Respondents to pay the dividends outstanding to the estate of the late John Watenga Mokoosio in the amount to be determined upon carrying out the aforesaid forensic audit.**
- 8. An order for the Respondents to effect the transfer of the shares of the Late John Watenga Mokoosio to the Petitioners as per the confirmed certificate of grant dated 2nd November 2018.**
- 9. An order compelling the Respondents to furnish the Petitioners with a share certificate.**
- 10. An order for the appointment of the Petitioners as Directors of the 4th Respondent to represent the family of the late John Wetenga Mokoosio as per Article 38 of the Articles of Association of the Company.**
- 11. Such further and other consequential orders, declarations and directions as this Honourable Court may consider appropriate for the purpose of enforcing and securing the enforcement of the rights of the Petitioners.**
- 12. That the costs of this Petition be borne by the Respondents.**

15. By a Notice of Motion dated 6th August, 2020, the Petitioners sought *inter alia* an order restraining and suspending the holding of the Annual General Meeting that was scheduled for 1st September, 2020 pending the hearing and determination of the said application. They further sought an order restraining the 4th Respondent Company, its Board of Directors, members and/or agents from convening, holding and/or conducting any subsequent Annual General Meeting pending the hearing and determination of the said application. In the same application the petitioners sought an order requiring the intended and/or subsequent Annual General Meeting to be convened, led and conducted in a manner considered appropriate by or under the supervision of this Court.

16. On 31st September, 2019, **Mwita, J** issued, *inter alia*, the following orders:

“The AGM scheduled for 1/9/2020 be and is hereby suspended until further orders/directions of the court.”

17. This Court has been urged to find that this matter has been overtaken by events since the 4th Respondent held its AGM for the year 2019 on 6th November, 2020 at 3pm. It is averred that the Petitioners were duly served with the relevant notice by the Company Secretary.

18. I have considered the issues raised in the petition as set out hereinabove. It is clear that the issues that fall for determination in this petition go far beyond the holding of the Annual General Meeting since they encompass other grievances the Petitioners have with regard to the manner in which the 4th Respondent company is being run by the other Respondents. Accordingly, the subject matter of this petition, assuming that the contention that the Annual General Meeting, was validly and lawfully held on 6th November, 2020 is true, is still extant.

19. As regards the application dated 6th August, 2020, the Learned Judge not only stopped the meeting that was scheduled for 1st September, 2020 but stated that the suspension was ***until further orders/directions of the court***. It is therefore arguable whether the Respondents could lawfully conduct an Annual General Meeting without further orders. I will however say no more on that issue. It is however clear to me that the issue whether or not the matter has been overtaken by events cannot be determined without an interpretation of that order.

20. As for the allegation that the Respondents were barred from filing further affidavits, the record does not expressly reveal so.

21. In the foregoing premises, I disallow the Respondents' objection to the hearing of this Petition on the ground that it has been overtaken by events.

22. The costs will be in the cause.

23. It is so ordered.

Read, signed and delivered in open Court at Machakos this 22nd April, 2021.

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Kimani for the Petitioners

Mr Mungai for the Respondents

CA Geoffrey