



REPUBLIC OF KENYA



KENYA LAW
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**Ravasio v Dingookriplani & 5 others (Petition E008 of 2020)
[2021] KEHC 102 (KLR) (Commercial and Tax) (23 September 2021) (Ruling)**

Neutral citation: [2021] KEHC 102 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
PETITION E008 OF 2020
WA OKWANY, J
SEPTEMBER 23, 2021**

BETWEEN

JOSEPH GUISEPPE RAVASIO PETITIONER

AND

NILESH DINGOOKRIPLANI 1ST RESPONDENT

ALFRED FELIX CLUSTER 2ND RESPONDENT

AVIATION WAREHOUSE INTERNATIONAL LIMITED 3RD RESPONDENT

HECTOR ROBERT DINIZ 4TH RESPONDENT

RAMESH RAICHAND PREMCHAND MEPA SHAH 5TH RESPONDENT

AFKO LUCK INVESTMENTS LIMITED 6TH RESPONDENT

RULING

1. This ruling is in respect to the application dated 18th September 2020 wherein the applicant seeks the following orders; -
 1. Spent
 2. THAT an order be issued compelling the 1st, 2nd, 3rd, 4th, 5th and 6th respondents to produce a Statement of Accounts and all records of expenses and liabilities with respect to the 6th respondent for the period of 2017 January up to 2019 December.
 3. THAT pending the hearing and determination of this application and petition herein, an interlocutory injunction be issued restraining the 6th respondent,



their servants, agents, employees or other parties through whom they may act from in any way accessing the 6th respondents premises (Lucky 8 Casino) on the 2nd floor at Galana Plaza along Galana road on property LR No. 2/2070/1 prior to the court appointed inspector accessing the premises to conduct an Independent review of the Business and forensic audit.

4. THAT the court appoints Messrs. PricewaterhouseCoopers (PWC) as court appointed inspector (at the cost of the 6th respondent to conduct an independent Business review and Forensic audit of the operations of the 6th respondent between the period January 2017 to date. within the timelines that the court may propose and within the terms of reference that the Court may deem fit in the circumstances and further direct every officer and agent of the 6th respondent to produce the appointed inspector of all documents of or relating to the 6th respondent that are in their custody or under their control, attend before the inspectors when required to do so and give the inspectors all assistance in connection with the inspection.
5. THAT the Court appoints PWC as a Court appointed valuers (at the cost of the 6th respondent) to conduct a valuation of the 6th respondent on the basis of the fair value of the ordinary shares assets, profitability and future prospects of the 6th respondent within the timelines that the court may propose and within the terms of reference that the court may deem fit in the circumstances and further direct every officer and agent of the 6th respondent to produce to the appointed inspector all documents of or relating to the 6th respondent that are in their custody or under their control, attend before the inspectors when required to do so and give the inspectors all assistance in connection with the valuation.
6. THAT an order be issued compelling the respondents to release forthwith to the petitioner under oath the following and any other documents that the court may direct
 - a. A schedule of all assets of the 6th respondent together with relevant documents of title
 - b. A schedule of all existing liabilities of the 6th respondent (including loan agreements)
 - c. The 2019 Audited financial Statement.
 - d. The 2020 interim audited Financial statement.
 - e. Filed Kenya Revenue Authority (KRA) Tax returns for the year 2018 to 2019.
 - f. Duly executed profit sharing agreement/rent to own Agreement dated 29th June 2019.
 - g. List of all Bank accounts both local and international (including Bank name, Branch, account number and Signatories) opened/operated in the name of the 6th respondent on or on behalf of the 6th respondent including those wherein funds received under the



guise of the profit sharing Agreement/rent to own Agreement were paid.

- h. Certified bank Statements for the Bank accounts referred to above
- i. Filed gaming returns to betting Licensing Control Board (BCLB) for the period of 2017 to 2019.

- 7. THAT costs of this application and interest thereon be provided for
- 8. THAT any other orders that this honourable court may deem fit in the interest of justice.

2. The application is brought under Section 780 and 782 of the *Companies Act, 2015*, 2015, Section 1A, 1B and 3A of the *Civil Procedure Act* CAP 21 laws of Kenya, Order 1 rule 3 and 8, Order 40 rule 2, 4 and 8 of the *Civil Procedure Rules, 2010*. It is supported by the affidavit sworn by Addisalem Belachew Demisse and is based on the following grounds; -

- a. On the 6th February 2020 at a board of Directors meeting, the Directors present including the 3rd, and 5th respondents took steps in furtherance of their own objectives towards the continued oppressive and prejudicial treatment of the petitioner by deliberating issues inter alia that
 - I. The increase of the Company Share Capital to Kshs 50,000,000.00 and issuance of 99,000 additional shares to be sold to the existing shareholders failing of which the shares would be sold to potential investors. In effect diluting the petitioners shareholding in the Company in attempt to squeeze him out
 - II. Without any notice of the petitioner as the managing director, the appointment of the 1st respondent as the managing Director was confirmed.
 - III. Without any Justification, evidence or supporting documents calling for the injunction of Kshs 21,000,000 in order to offset debts owed by the company. Whereas, the 1st, 2nd, 3rd, 4th, and 5th respondents had unilaterally entered into a profit sharing or rent to own Agreement with Mr. Yuan Fangwenjin, Mr. Wang Li Ping and Mr. Guo Jun Feng had undertaken to pay through or on behalf of the Company the rent, salaries, supplies and any other monies towards the smooth running of the business
- b. The 1st, 2nd, 3rd, 4th, and 5th respondents have conducted the affairs of the 6th respondent in a manner that is oppressive and unfairly prejudicial to the interests of the petitioner.
- c. There is continued outright mismanagement and lack of accountability for the expenses of the Company by the 1st, 2nd, 3rd, 4th, and 5th respondents all in a deliberate effort towards causing the petitioner to abandon their rightful interest in the Company.

3. The respondent opposed the application through the replying affidavit of its Chief Executive Officer Mr. Ramesh Raichand Premchand Mepa Shah who denies the allegation that the respondents treated the applicant in an oppressive and prejudicial manner. He states that the petitioner purchased the 6th



respondent from the original owners between the years 2013 and 2014 and that in 2015 the petitioner invited the 3rd and 4th respondents to invest in the said company. He further states that when company started making losses, the partners agreed to channel funds into it in accordance with their respective shareholding in order to keep it afloat but that the petitioner did not honor his promise to inject funds into the business thus occasioning the Company huge cash constraints. He denies the allegations that the Company income had been channeled to third parties.

4. The application was canvassed by way of written submissions which I have considered. The main issue for determination is whether the applicant has made out a case for granting of the orders sought in the application dated 18th September 2020.
5. The applicant's case is that the 1st, 2nd, 3rd, 4th, and 5th respondents have conducted the affairs of the 6th respondent in a manner that is oppressive and unfairly prejudicial to him. He accuses the respondents of eroding equity share through artificial cash calls, excluding him from decision making concerning the affairs of the Company and denying him right to access the company's financial records.
6. The applicant cited Sections 780 and 782 of the [Companies Act, 2015](#) 2015 which stipulate as follows: -

Section 780

- (1) A member of a company may apply to the Court by application for an order under section 782 on the ground—
 - (a) that the company's affairs are being or have been conducted in a manner that is oppressive or is unfairly prejudicial to the interests of members generally or of some part of its members (including the applicant); or
 - (b) that an actual or proposed act or omission of the company (including an act or omission on its behalf) is or would be oppressive or so prejudicial.

Section 782

- “(1) If, on the hearing of an application made in relation to a company under section 780 or 781, the Court finds the grounds on which the application is made to be substantiated, it may make such orders in respect of the company as it considers appropriate for giving relief in respect of the matters complained of.
- (2) In making such an order, the Court may do all or any of the following:
 - (a) regulate the conduct of the affairs of the company in the future;
 - (b) require the company—
 - (i) to refrain from doing or continuing an act complained of; or
 - (ii) to do an act that the applicant has complained it has omitted to do;
 - (c) authorize civil proceedings to be brought in the name and on behalf of the company by such person or persons and on such terms as the Court directs;



- (d) require the company not to make any, or any specified, alterations in its articles without the leave of the Court;
 - (e) provide for the purchase of the shares of any members of the company by other members or by the company itself and, in the case of a purchase by the company itself, the reduction of the company's capital accordingly.
- (3) Subsection (2) does not limit the general effect of subsection (1).
- (4) The company is entitled to be served with a copy of the application and to appear and be heard as respondent at the hearing of the application.”
7. On their part, the respondents argued that a court of law should not interfere with the internal affairs or operations of a company. They observed that the matters raised by the applicant were purely internal affairs of the Company which should not be litigated by the court. They further contended that the allegations made by the applicant were not supported by evidence.
8. In *John Muturi Nyaga vs Graham Alexander Walsh & 3 Others* [2017] the Court stated as follows regarding the procedure under a Section 780: -
- “The application must be one that allows and provides for a substantive interrogation of the Applicants grievances. In addition, it must be a procedure within which a deserving Applicant can seek and obtain interlocutory relief pending the substantive outcome.”
9. In *Re K Boat Service* [1998] eKLR, Kuloba, J. held: -
- “Courts will interfere only where the act complained of is ultra vires or is of a fraudulent character or not rectifiable by ordinary resolution. It is really (sic) very important to companies and to the economy of the country in general, that the court should not, unless a very strong case is made out on the facts pleaded and proved or admitted, take upon itself to interfere with the domestic forum which has been established for the management of the affairs of a company”.
10. The above decisions mirror the principles set in the landmark case of *Foss v Harbottle* (1843) 2 Hare 261 where it was held that courts will only interfere with the affairs of the company where the act complained of is ultra vires, or is fraudulent or not rectifiable by an ordinary resolution.
11. In the present case, the applicant contends that there were acts of fraud in the maintenance of the Company's books of account, illegality in the conduct of the respondents and ultra vires acts by the Company's Board of Directors.
12. My finding is that for the applicant to enjoy the reliefs provided for in Section 780 of the [Companies Act, 2015](#), he needed to demonstrate that the respondents conducted the affairs of the 6th respondent in a manner that is oppressive and unfairly prejudicial to his affairs. I however note that the applicant did not present any material before this court to support his claim. I am not satisfied that the matters complained of are ultra vires or border on fraud but are such that they can be resolved by the company itself.
13. In sum, I find that the application dated 18th September 2020 is not merited and I therefore dismiss it with costs to the respondents.



DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT NAIROBI THIS 23RD DAY OF SEPTEMBER 2021 IN VIEW OF THE DECLARATION OF MEASURES RESTRICTING COURT OPERATIONS DUE TO COVID-19 PANDEMIC AND IN LIGHT OF THE DIRECTIONS ISSUED BY HIS LORDSHIP, THE CHIEF JUSTICE ON THE 17TH APRIL 2020.

W. A. OKWANY

JUDGE

In the presence of:

Mr. Nkarichia for Guto Mogere for the plaintiff.

Mr. Musyoka for Kago for Defendants/Respondents

Court Assistant: Sylvia.

