



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
COMMERCIAL & TAX DIVISION
PETITION NO. 7 OF 2018

IN THE MATTER OF NEW AL-NOOR EXHIBITION LIMITED

AND

IN THE MATTER OF THE COMPANIES ACT NO. 17 OF 2015

AND

IN THE MATTER OF AN APPLICATION UNDER INTER ALIA SECTION 780, 782, 786, AND 789 OF THE COMPANIES ACT NO. 17 OF 2015

MEHUBA GELANI KELIL.....PETITIONER

-VERSUS-

TOWHIDA AWO SHARIFF.....1ST RESPONDENT

ISHA AWO SHARIFF.....2ND RESPONDENT

KHADRA SHARIFF ALI ALSO KNOWN AS KHADRA SHARIFF AWO.....3RD RESPONDENT

ISMAHAN AWO SHARIFF MOHAMED.....4TH RESPONDENT

AND

NEW AL-NOOR EXHIBITIONS LIMITED.....INTERESTED PARTY

RULING

BACKGROUND

The Petitioner herein Mehuba Gelani Kelili filed a Petition dated 22nd August 2018, pleading that;

1. The original shareholders were as follows;

- AWO SHERIFF MOHAMD NOR - 900 shares
- FEISAL SHERIFF MOHAMED NOOR - 100 shares

2. The principal business which is carried on by the Company is trading and establishing, owning, renting leasing and acquiring shops, supermarkets, grocery shops, warehouses and factories and carrying on business as trader and general merchants.

3. At all material times, the said AWO SHERIFF MOHAMED NOOR was the husband of the Petitioner and the father of all the

Petitioner's children. In addition, the said AWO SHERIFF MOHAMED NOOR was the father of the 1st and 2nd Respondent and the ex-husband of the 3rd Respondent. The 3rd Respondent is the biological mother of the 1st and 2nd Respondents.

4. On a date unknown to the Petitioner, the share capital of the Company was increased to Ksh 1,000,000.00 divided into 10,000 shares of Ksh 100.00 each out of which only 1,000 shares were allotted. The remaining 9,000 shares remain unallotted to date. The records of this increase in the share capital of the Company do not exist at the Companies Registry as required by the law and it is unclear to the petitioner if due process was followed in increasing the share capital of the Company.

5. Consequently, *Nairobi Succession Cause No. 1774 of 2010* (in the matter of the estate of AWO SHARIFF MOHAMED NOOR) was filed ("**the succession case**") and a grant of letters of administration was issued on 26th July 2010, appointing the following individuals as administrators of the estate of the deceased;

- Mehuba Gelan Kelil (the Petitioner in this case)
- Towhidha Awo Shariff (the 1st Respondent in this cause)
- Isha Awo Shariff (the 2nd Respondent)

6. The grant in the Succession Case was ultimately confirmed on 17th July 2012 and the Deceased's shares in the Company (which then stood at 800 shares) were distributed.

7. The petitioner collectively holds a total of 381 shares both in her own right and in trust for her children) which is equivalent to 38.1% of the issued and allotted share capital of the Company. The Petitioner is also one of the directors of the Company with effect from 7th May 2013.

CERTIFICATE OF URGENCY APPLICATION

On 27th August 2018 the Petitioner filed Certificate of Urgency Application dated 24th August 2018, seeking to be heard on priority for reasons;

1. That the Petitioner is the largest single shareholder of New Al-Noor Exhibitions Limited, the Interested Party in this suit and she currently holds a total of 381 shares both in her own right and in trust for her children. She is however in the minority in terms of control of the Company and its affairs.

2. That Petitioner is in addition a director of the board of New Al-Noor Exhibitions Limited (hereafter "the Company")

3. That the Company was originally owned by Awo Shariff Mohamed Noor (deceased) who held 800 shares in the Company and his daughter, 4th Respondent, who held 200 shares in trust for the children of Awo Shariff Mohamed Noor. The total shares issued ordinary share capital of the Company was 1,000 shares.

4. That the Petitioner has since learnt that the total shares issued share capital of the Company is now 10,000 shares, [9,000 of which remain unallotted] and is unaware how the increment of the issued share capital of the Company was effected as she did not participate nor consent to such increment.

5. That the Respondents have unilaterally taken day to say control of the Company conducted its affairs in an oppressive manner. 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 Applicants).

The Certificate of urgency was filed together with a Notice of Motion application where the Applicant sought orders;

a. Leave be granted to serve the 1st, 2nd, 3rd and 4th Respondents with all the pleadings filed in this matter and any orders issued by the court by way of substituted means through their e-mail addressed or by registered courier to their last known postal address or by such other means that this honourable court may direct in the circumstances.

b. Pending the hearing and determination of this application, a conservatory order do issue restraining the interested Party and the Respondents from selling, disposing of, transferring, charging or in any other manner whatsoever dealing with or disposing of their interest in the shares they own or in any other manner howsoever interfering with the entries in the shareholder register of New Al-Noor Exhibitions Limited.

c. Pending the hearing and determination of this application, an order be issued restraining the 3rd Respondent, Khariff Ali [aka Khadra Shariff Awo] from in any manner whatsoever executing any duties in the capacity of and/or carrying out and/or holding out herself as director of New Al-Noor Exhibitions Limited.

d. The court appoints a registered estate agent to manage all the real estate of the Company known as New Al-Noor Exhibitions Limited pending the hearing and determination of this application.

e. The court appoints Messrs. Price WaterHouse Coopers ("PWC") as a court appointed inspector [at the cost of the Interested Party] to conduct an Independent Business Review of the operations of New Al-Noor Exhibitions Limited between the periods July 2009 to

date. Within the timelines that the court may propose and with terms of reference that the court may deem fit in the circumstances and further direct every officer and agent of the Interested Party to produce to the appointed inspector all documents of or relating to New Al-Noor Exhibitions Limited that are in their custody or under their control, attend before the inspectors when required to do so and give to the inspectors all assistance in connection with the inspection.

f. The court appoints PWC as a court appointed inspector [at the cost of the Interested Party] to conduct a valuation of the ordinary shares of New Al-Noor Exhibitions Limited. Within the timelines that the court may propose and with terms of reference that the court may deem fit in the circumstances and further direct every officer and agent of the Interested Party to produce to the appointed inspector all documents of or relating to New Al-Noor Exhibitions Limited that are in their custody or under their control, attend before the inspectors when required to do so and give to the inspectors all assistance in connection with the process.

g. The Respondents and the interested Party, do release forthwith to the Petitioner under oath, the following and any other documents that this court may direct;

- a. A schedule of all assets of the Company together with relevant documents of title.
- b. A schedule of all existing liabilities of the Company [including loans].
- c. The PIN Certificate and VAT Certificate of the Company
- d. Filed tax returns of the Company for the years 2009 to 2017.
- e. List of all bank accounts, both local or international, [including bank name, branch and account number and signatories of those accounts] opened/operated in the name of the company between the period 2009 to date
- f. Certified bank statements for the bank accounts referred to above
- g. Audited accounts of the Company for the period 2009 to 2017.
- h. Copies of all contracts of employment of all employees of the Company.
- i. Signed minutes and resolutions of the Company since the year 2009.
- j. Evidence of payment of tax obligations for all senior level management staff.

REPLYING AFFIDAVIT

The Petition and the Application were opposed vide a Replying Affidavit dated 16th November 2018, sworn by Khadra Sharif Awo the 3rd Respondent who is a shareholder and a director of the Interested Party. She stated that as per the Petitioner/Applicant allegation, individually and through trust holds Three Hundred and Eighty one (381) ordinary shares amounting to Thirty Eight decimal One Percent (38.1%) equity in the company and is therefore the largest single beneficial shareholder but not by any imagination the majority shareholder of the company.

That the larger part of the said allegations are what would amount as to wrongs done against the Company itself as opposed to any individual shareholder;

She asserts that in any proceedings or action in respect of a wrong done to the company, a cause of action for injury to the property of a corporation or for impairment or destruction of its business is vested in the corporation, as distinguished from its shareholders;

That to recover for wrongs done to the corporation, a shareholder must bring the suit derivatively in the name of the corporation so that each shareholder will be made whole if the corporation obtains compensation from the wrongdoer. In a derivative action lawsuit, the shareholder brings the claim in a representative capacity. The real party in interest is the corporation, not the Plaintiff shareholder

That it is cardinal that as a body corporate separate and distinct from its members, if an issue of interference with shareholding or directorship or management was to occur as alleged in the present application, then the proper party to make the application would have been the company, in this case NEW AL-NOOR EXHIBITIONS LIMITED;

That therefore the suit, in so far as it purports to have been brought seeking to enforce the Petitioner/Applicant's rights and to right allegations of mismanagement of the Company is a derivative action;

That contrary to the fallacious allegations by the Petitioner/Applicant there was never any trust created or even the intention for the creation of a trust with regard to the transfer of shares to ISMAHAN SHARIFF AWO or at all;

That on 20th March 2005, FEISAL SHARIFF MOHAMED NOOR transferred all his 100 ordinary SHARES in the Company to AWO SHARIFF MOHAMED NOOR (deceased) and the change in the shareholding in the Company was duly registered and reflected as follows;

- a. AWO SHARIFF MOHAMED NOOR - 800 Ordinary Shares

That concurrent with the transfer of shares to the 4th Respondent and her appointment as a director in the Company, the 1st Respondent was appointed Chief Operating Officer by the deceased himself and has always acted as such throughout till the demise of the patriarch and continued in the same position after his death and to date;

That vide the resolution dated 7th January 2006, the Company changed its name from ALNOOR EXHIBITIONS LIMITED to NEW ALNOOR EXHIBITIONS LIMITED.

That upon the demise of AWO SHARIFF MOHAMED NOOR and on the 17th August 2009, the Petitioner/Applicant, the 1st and 2nd Respondents obtained Limited grant letter of Administration *Ad Colligenda Bona* as representatives of the estate of the deceased effective the 17th August 2009.

She averred that she was the first and elder wife to the deceased having been married on 18th December 1978 and the mother to ISHA AWO SHARIFF MOHAMED, ISMAHAN AWO SHARIFF MOHAMED, ZAHRA SHARIFF AWO MOHAMED, TOWHIDA AWO SHARIFF MOHAMED, UMIKHEIR AWO SHARIFF MOHAMED, SAMIRA AWO SHARIFF, SUMMAYAH AWO SHARIFF MOHAMED and IMRANA AWO SHARIFF MOHAMED.

That the 3rd Respondent and the deceased never divorced and the decision not to participate in the succession matter at the time was her own out of her good faith but she now intended to make the necessary application before the relevant court over the same issue noting the apparent malice and ill will adopted by the Petitioner/Applicant over her position.

That on 26th July, 2010 the Petitioner, the 1st and 2nd Respondents were issued with Grant of letters of Administration Intestate.

That vide the Resolutions of 25th June 2012, the 4th Respondent sold and transferred 110 ordinary Shares held by her in the Company to 3rd Respondent and a Transfer of Shares was duly executed accordingly and registered.

That 3rd Respondent being the mother to the 4th Respondent; the sale was sanctioned by the tenets of **Article 9(viii) of the Articles of Association** of the Company which by its own clear terms exempts the transferor from issuing Notice as required by the provisions of **Article 9(i)**;

That on 17th July 2012 the Grant of Representation issued to the Petitioner, the 1st and 2nd Respondents was duly confirmed and a Certificate of Confirmation of Grant issued vide which all the beneficiaries of the Estate of the deceased acquired shares in the Company.

CERTIFICATE OF URGENCY DATED 23RD JANUARY 2019

By a certificate of Urgency Application dated 23rd January 2019, the Petitioner sought to be heard urgently for reasons;

- a. That the Hon. L. J. R. Ngetich issued a consent order on 8th October 2018 (“**the Consent order**”) in the presence of Counsel for the Respondents but in the absence of the Interested party;
- b. That the consent order was extracted and served upon Counsel for the Respondents and upon the Interested party. An affidavit was thereafter duly prepared and filed in court by a court process server and forms part of the court record.
- c. That the Respondents partly complied with the terms of the consent order but have substantially failed to comply with the terms of the consent order to the extent demonstrated in this application and the affidavit filed in support.
- d. That the Respondents and the Interested party are in contempt of court as they have failed, refused and/or neglected to comply with the express orders of the court despite being present in court through counsel, despite the consent order having been issued by consent of parties and despite being served with the court order and being requested repeatedly by the petitioner’s counsel to comply with the court order.
- e. That the contemnors are public officers who are enjoined by **Article 10 and Chapter 6 of the Constitution** to respect the rule of law and by extension, comply with court orders directed at them and/or the institutions they lead.
- f. That court orders are not made in vain and ought to be complied with.
- g. That the Respondents and the interested Party are wilfully and deliberately interfering with administration of justice to the detriment of the petitioner.

The Petitioner filed a Notice of Motion application dated 23rd January 2019, under the provisions of **section 3A and 63(c) of the Civil Procedure Act, Section 4(1)(a), 5, 28(1) and 29 of the Contempt of Court Act, 2016, Order 40 Rule 3, 8 of the Civil Procedure Rules**, the inherent powers of the court and other enabling provisions of the Law. The Applicant/Petitioner sought orders;

1. The Court do cite the following for contempt of court,

- a. Towhida Awo Shariff
- b. Isha Awo Shariff
- c. Khadra Shariff Ali (also known as Khadra Shariff Awo)
- d. Ismahan Awo Shariff Mohamed
- e. New Al-Noor Exhibitions Limited

2. The following individuals be committed to civil jail for a period of six [6] months for contempt of court

- a. Towhida Awo Shariff
- b. Isha Awo Shariff
- c. Khadra Shariff Ali (also known as Khadra Shariff Awo)
- d. Ismahan Awo Shariff Mohamed

3. The Interested Party, New Al-Noor Exhibitions Limited be fined a sum of Ksh 200,000.00 for contempt of court or such other sum that the court may deem fit and just in the circumstances.

The application was supported by an affidavit dated 23rd January 2019, sworn by Mehuba Gelani Kilel, the Petitioner herein. She stated that the Respondents partly complied with the terms of the Consent order but had substantially failed to comply with the terms of the consent order to the following extent;

- a. The documents itemised in order 2 of the consent order had never been produced under oath (as some documents were forwarded under cover of a letter dated 16th November 2018 from the Respondents' counsel.
- b. The VAT Certificate of the interested party had never been produced.
- c. The only tax returns submitted were for the years 2013 and 2014 whilst the consent Order required production of tax returns for the years 2009 – 2017. The Respondents and the Interested Party were therefore yet to produce the tax returns for the years 2009, 2010, 2011, 2012, 2015, 2016 and 2017.
- d. They had not produced a list of signatories for all bank accounts operated by the Interested Party between the period 2009 to date.
- e. Certified bank accounts from Barclays Bank of Kenya had not been provided.
- f. The bank statements provided did not cover the period 2009 to date.
- g. They had only provided audited accounts for the years 2012, 2013 and 2017 leaving out the years 2009, 2010, 2011, 2015 and 2016. Audited accounts for the year 2014 that were submitted were unsigned both by the auditor and the directors of the Company.
- h. They had not provided evidence of payment of tax obligations for senior management staff.
- i. They had not provided all employment contracts for members of staff – they provided only three contracts of employment for David Shilingi, Ibrahim Dike and Hassan Sori
- j. They were required to provide all signed minutes and resolutions of the Interested Party since the year 2009- but only provided signed minutes for meetings held on 25th June 2012, 7th May 2013 and 9th December 2016 and signed resolutions dated 24th August 2009, 7th May 2013 and 9th December 2016.

REPLYING AFFIDAVIT

The Application was opposed by an affidavit of Khadra Shariff Awo the 3rd Respondent, dated 9th July 2019. She deponed that the provisions of the law under which the Petitioner/Applicant seeks relief in her Notice of Motion application are a nullity by virtue of the entire **Contempt of Court Act** has been declared by the High Court on 9th November, 2018 as being inconsistent with the Constitution and therefore null and void.

She states that without prejudice to the above, for valid contempt proceedings where it is alleged that a court order has been disobeyed, the order allegedly disobeyed must be clear in its terms, it must have been served upon the Respondents personally or the Respondents must have actual or constructive knowledge of the order together with an endorsed penal notice warning of the consequences of disobedience. In this instance no Penal Notice was ever served upon the Respondents at all;

That the 3rd Respondent acted on the authority of the 1st 2nd and 4th Respondents who all reside outside the country, the 1st Respondent resides and works in Doha, Qatar while 2nd and 4th Respondents reside in London, United Kingdom and have not been personally served with the court order and/or have no personal knowledge of the same;

That the alleged Order is clothed in ambiguity requiring the documents to be supplied under oath without expounding what under oath means hence the letter dated 19th November 2018 from the Respondent's advocates to the Applicant's Advocates requesting for clarification which clarification never came;

She averred that the Applicant is not candid and truthful in alleging that there is no challenge to the consent order by way of review of an application to set aside. The Respondents filed and served upon them the Notice of Motion Application dated 21st January 2019, filed on 22nd January 2019, seeking to set aside the said consent orders. The application to set aside is on grounds that the Respondents cannot fully comply with the terms of the said consent order as it is impossible to do so.

Indeed, the Respondents shall during the hearing of the contempt application rely on the grounds on the face of this application and the Affidavit filed thereto to expound on the reasons as to the impossibility to comply.

That the same cannot however be said of the Applicant who equally being a shareholder and alleged Director in the Interested Party; knowing the impossibility of execution of some terms of the order, having been served with the application to set aside the consent order prior to her filing the contempt application still ran to this honourable Court to file the present application in a manner that reeks of malice.

That the Respondents had provided all the documents in their possession in a bid to comply with the court order and averred as follows on the alleged non-compliance;

- a. The Applicant did not clarify what "Under oath" meant to them.
- b. That the same set of bundle of documents supplied to the Applicant had been annexed to the Replying Affidavit filed on 16th November 2018 which was Under Oath and had been served upon the Applicant.
- c. The Kenya Revenue Authority does not issue a separate VAT Certificate other than the PIN Certificate which includes the VAT Certificate since the inception of the online iTax system. And the same PIN Certificate containing the VAT details has been furnished upon the Applicant.
- d. The Tax Returns supplied are the only Tax returns in the Respondents hands;
- e. That the signatories to the Bank are the Interested Parties directors;
- f. The Respondents have been sued herein in their capacity as directors and shareholders of the Interested Party which role they legally assumed on the 18th December 2012, and can therefore only avail information as from the said date;
- g. The Respondent has no senior management staff and cannot therefore produce proof of payment of the "same senior management staff"
- h. The Respondents have supplied the employment contractors of the staff who have executed the same.

That while contempt of court is constituted by conduct that denotes wilful defiance of or disrespect towards the court or that wilfully challenges or affronts the authority of the court or the supremacy of the law, as has been demonstrated above, the conduct by the Respondents cannot by any vein of thought be deemed as wilful defiance or disrespectful.

DETERMINATION

After consideration of the pleadings and submissions to the application for contempt of Court of 23rd January 2019, the Court found the following issues arising for determination;

- a. Is there a competent application for contempt of Court before Court?**
- b. Is the application based on a competent suit before Court?**
- c. Should the Court grant the orders sought?**

ANALYSIS

The Applicant submitted orally that the Respondents are in control of the Company; as Board of Directors and shareholders and in charge of day to day running of the Company. This is confirmed by CR12 annexed to the bundle with the Petition.

The Court order the subject of contempt proceedings is one of 8th October 2018 where the Court granted orders 3 & 8 of the Application of 24th August 2018 by consent of parties through their advocates. The 3rd Defendant was served but was not represented.

The order was extracted and served to parties. There has been partial compliance with the terms as was admitted in Court on 20th November 2018. It is a year since and the Respondents have not complied and are not mitigating the circumstances.

Contempt of Court is to ensure parties comply with Court orders, if parties are not penalized it erodes public confidence to the Court and ultimately endangers rule of law in society.

The Respondents claim non-compliance is based on the fact that the orders were ambiguous/not clear enough and that they have done their best as is practically possible. They did not seek clarification from the Court and have not done so to date.

The Respondents failed to provide audited accounts from 2009-2017, they provided only 2012, 2013 & 2017. They failed to provide Tax Returns from 2009-2017 but they provided only for 2013 & 2014. The lack of relevant information deprives the Petitioner the ability to prosecute the Petition successfully.

Respondent contends that the instant application is not competent before Court as it is brought without compliance of the parameters set out in **Jacob Zedekiah Ochino & Anor vs Okombo & 4 Others 1989 eKLR** which set out conditions;

- a. The Court order shall be served to the person required to do or abstain from doing the act in question.
- b. The Court order shall have a Penal Notice informing the person on whom the copy is served he is liable for the process of execution to compel him to do so.
- c. The Court will only punish as contempt if the Court order was /is unambiguous
- d. The Defendants had proper notice of the terms and breach which are proved beyond reasonable doubt
- e. The procedure for bringing contempt application is proper.

The 2nd issue raised is that the Law of Contempt Act was declared unconstitutional in **Kenya Human Rights Commission vs Attorney General & Anor (2018)eKLR**. The application for contempt can only be brought under the provisions of **Section 5 Judicature Act** which kicked in after declaration of unconstitutionality of the Substantive Statute on contempt of court.

The Court finds that there is a competent application for contempt for the following reasons;

- a. The impugned orders emanated from *inter partes* Court proceedings before LJ R.Ngetich on 8th October 2018 which waives the mandatory requirement of direct service to the Contemnors(s). They were represented in Court and agreed by consent to Prayers 3 & 8 of the application filed on 27th August 2018.
- b. The said Consent was extracted and served to all parties on compliance.
- c. On 20th November 2018, parties appeared before LJ R Ngetich and confirmed the consent and admitted non compliance. It is a year since, and they have not completed compliance by availing the outlined documents in order 3 & 8 of the application.
- d. If there was/is any ambiguity as claimed by the Respondents in their submissions, the Court has not been moved to clarify, amend , vary or explain/expound on the said Court order(s) and Consent.
- e. During the Proceedings of the instant application, it is admitted that there was/is partial compliance. There is no reasonable explanation, challenges and/or circumstances presented by the parties to the Court on why parties/Respondents have not fully complied with the terms of the Consent/Court order.
- f. The filing of the pending application for review is not a bar to compliance and does not waive the right to comply with Court orders until reviewed, varied, set aside or successfully appealed against.

Econet Wireless Kenya Limited vs Minister for Information & Communication of Kenya & Communications Commission of Kenya; Misc 1640 of 2003;

“It is essential for the maintenance of the Rule of Law and good order that the authority and dignity of our Courts are upheld at all times. This Court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved Contemnors.....

In Hadkinson vs Hadkinson (1952)2 All ER 567; it was held that: It is plain and unqualified obligation of every person against or in respect of , who an order is made by a Court of competent jurisdiction to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to case where the person affected by an order believes it to be irregular or even void.

The fact of the instant matter/application not being brought under the proper provisions of law; that the **Contempt of Court Act** being declared unconstitutional is conceded. However, the contempt is based on **Section 5 of Judicature Act**. The fact that the relevant section was not cited does not declare the application incompetent by virtue of

Order 51 Rule 10 CPR 2010 which provides;

- (1) Every order, rule or other statutory provision under or by virtue of which any application is made must ordinarily be stated, but no objection shall be made and no application shall be refused merely by reason of a failure to comply with this rule.**
- (2) No application shall be defeated on a technicality or for want of form that does not affect the substance of the application.**

The Respondent raised issue of the fact that the Respondents were not directly served as they reside abroad. The Respondents are children of the 3rd Respondent and are represented by the Petitioner who is an administrator of the estate of Awo Shariff Mohammed (deceased). They derived their shares in the Company from the Confirmed grant of 17th July 2012. Thirdly, the contempt complained of could not be committed by the Respondents residing out of the country; logically they are/were not in the Country, it is upon the Directors of the New Al Noor Company Limited present in Kenya and running the Company on a day to day basis to comply. The requirement of direct service is waived by the fact of the Respondents being out of the country represented in court by their Lawyer/Advocate during the court order/consent proceedings.

c) Is the application based on a competent suit before Court?

The issue is that the Respondents should not be sued in their private capacities but should have the Company joined to the Proceedings as a party and not interested party. The company should also be the Plaintiff/Applicant. The Respondent submitted that the Company ought to be sued as it holds the shares. The issue of interference with shareholding or directorship or management relates to the Company New Al Noor Exhibition Limited. Therefore, the Company ought to be joined as a party and thereafter, the Petitioner to move the Court in a derivative action.

The Court finds the submission plausible; the Directors of a Company are the mind and body of the Company and their actions are on behalf and for the benefit of the Company. The Company should be a party to these proceedings. However, the company does not have to be the Plaintiff/Petitioner as the Applicant is entitled to derive authority to sue on behalf of the company in a derivative claim/suit.

Section 238 Companies Act provides for an applicant member to seek leave from Court to proceed with an action against the Company for protection of members against unfair prejudice; where the persons complained of, control the Company and their action amounts to a fraud on the minority. The matter complained of must be in relation to act or omission involving negligence, default, breach of duty or breach of trust by a director (including former Director) of the company as provided for by **Section 238(3) of Companies Act**.

The instant matter falls squarely within the parameters of **Section 238 Companies Act** and is a derivative suit. **Section 239 of Companies Act** grants an Applicant who is a member of the Company to seek leave of Court to sue in a derivative suit and /or continue with the suit already filed. There is therefore, in the absence of timelines the opportunity to join the Company as a party and the Petitioner/Applicant as Director/Shareholder/Member of the Company to seek leave from Court to pursue the derivative claim during these proceedings. It is not fatal to the instant application of contempt of Court.

a. Should the Court grant the orders sought?

From the Evidence on record, the Court finds that the Respondents, specifically, Khadra Shariff Ali alias Khadra Shariff Awo(mother of 1st & 2nd Respondents) and Ismahan Awo Shariff Mohammed 3rd & 4th Respondents are in actual control of the New Al Noor Exhibition Company Limited to the exclusion of Mehuba Gelani Kelil the Petitioner one of the administrators of the estate of Awo sheriff Mohammed Noor (deceased) one of the founders Directors of the Company.

Mehuba Gelani Kelil the Petitioner, holds majority shares in the Company and has filed Certificate of Confirmation of Grant from **Succession Cause 1774 of 2009** of 17th July 2012 that bequeaths her and other beneficiaries of the deceased's estate shares of the Company. It is noted that 3rd Respondent did not participate in the succession proceedings but is shareholder member and Director of the Company excluding the Petitioner.

The **CR12** of 14th May 2015, also annexed to the Petition outlines shareholders and/or directors of the Company. The Petitioner owns 81 shares in the Company.

In spite of valid and legal Certificate of Confirmation of Grant, an order from the Family Division of the High Court and the Official document CR12 from Companies Registry, the Petitioner is shut out from day to day operations and management of the Company. The Petitioner lacks access, participation, decision-making opportunities in the Company as one of the Directors and the right to enjoy profit(s)/dividends.

The impugned Consent/Court order(s) of 8th October, 2018 were to enforce the Petitioner's rights in the Company pending hearing and determination of the petition, and/or pending application(s).

The Respondents have declined and continue not to comply with the Consent/Court Orders and in the absence of any explanation or compliance are in contempt of Court.

These orders buttress legal requirements of Directors of a Company outlined in **Section 142 of Companies Act** which provide;

A director of a company shall—

a. act in accordance with the constitution of the company;

and

b. only exercise powers for the purposes for which they are conferred.

So the Respondents are in contempt of the Consent/Court Order, Confirmed grant and Companies Act.

This court has considered the following factors;

This is a family dispute commingled with the running of the Company which is a family business. Therefore, it is incumbent upon the Court to ensure that on the one hand the Company continues to run as a going concern for the benefit of ALL members. On the other hand, grant opportunity to aggrieved family members to resolve their differences in various dispute resolution processes and more importantly, the Family Division of the High Court.

Contempt proceedings are a last resort, as it involves non compliance of the Court orders issued that remain in force until or unless set aside.

The key issue for this Court is what the Contempt proceedings and resultant punitive orders will achieve in ensuring smooth running of the Company and resolve family conflict. **Sections 780, 782, 786 & 789 of Companies Act 2015**, are geared to withdraw/remove the Directors/ shareholders from day to day running of the company while it is under inspection at cost to the company. This is drastic step and may escalate the already family/business dispute.

It is in the interest of justice that a party cited for contempt of Court is accorded an opportunity to purge the Contempt before punishment.

In the same vein the Court has to consider the reasons advanced for non compliance.

DISPOSITION

- 1. Due to the unique nature of the present circumstances; that is being sensitive to ensure compliance of Court orders and at the same time ensuring the preservation of the family fabric; the Court grants the Respondents a window to complete compliance with Consent/Court orders of 8th October 2018 within 60 days from today . Not to sell/transfer/dispose of any of the Company's Assets and to comply by providing ALL documents listed in the Consent/Court Order in the court to the Petitioner/Applicant.**
- 2. In default the Court shall be moved to consider prayers outlined in the instant application, committal to civil jail of Respondents, fine to the Company for contempt and any other legal/legitimate order in the circumstances.**
- 3. The matter shall be mentioned on 30th May 2020 for confirmation of Compliance of the Court orders by the Respondents to the Court and/or application to visit the orders sought to purge the Contempt.**
- 4. The petitioner shall amend the petition appropriately and serve and seek leave to pursue derivative claim on behalf of the Company.**
- 5. The application is partly granted with costs to the Petitioner.**

DELIVERED SIGNED & DATED IN OPEN COURT ON 28th FEBRUARY 2020.

M.W. MUIGAI

JUDGE

IN THE PRESENCE OF:

NYARIBO FOR THE PETITIONER

RAJAB & MBOGO ADVOCATES FOR THE RESPONDENTS

COURT ASSISTANT- MR. TUPET