



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

MISCELLANEOUS APPLICATION NO 112 OF 2019

IN THE MATTER OF: MERU EQUATORIAL NUTS LIMITED

AND

THE COMPANIES ACT NO.17 OF 2015

AND

IN THE MATTER OF: AN APPLICATION UNDER SECTION 780(1), 782(1), 782(2), 782(2)(c), 238 OF THE COMPANIES ACT, NO.17 OF 2015

IN THE MATTER OF: AN APPLICATION FOR PROTECTION OF A MINORITY

SHAREHOLDER (THILANGE MUNJURI ACQUILINO) AGAINST OPPRESSIVE CONDUCT AND LEAVE TO COMMENCE A DERIVATIVE ACTION

BETWEEN

THILANGE MUNJURI ACQUILINO.....APPLICANT

VERSUS

BAIMURU INVESTMENTS LIMITED.....1ST RESPONDENT

MUTUAH CHARLES MUTHURI.....2ND RESPONDENT

JOE KINYUA IMITIRA.....3RD RESPONDENT

MERU EQUATORIAL NUTS LIMITED.....4TH RESPONDENT

RULING

1. By an application dated 10th of October 2019 brought under certificate of urgency the Applicant prayed for orders of injunction to restrain the Respondents from proceeding to hold an extraordinary General Meeting on 24th October 2019 as requisitioned in the notice dated 27th of November 2019 or any other meeting subsequently thereto for the removal of the Applicant as a Director of the 4th Respondent.
2. The Applicant also sought that the Respondents be restrained from opening, or operating any bank accounts other than Diamond Trust Bank Ltd or borrowing loans or any credit facilities in the name of the 4th Respondent without approval or resolution of the Applicant or a resolution of all the Directors of the 4th Respondent.
3. The Applicant also sought that he be allowed to serve the orders of the court and the application upon the 1st, 2nd and 3rd Respondents by way of email addresses shown on the application.
4. The Applicant also sought that the court declares that the affairs of the 4th Respondent have been conducted in an oppressive manner and/or in a manner prejudicial to the interest of the Applicant.
5. The Applicant further sought that the court declares that the failure by the Respondents to supply reasons for the removal of the Applicant

as a Director of the 4th Respondent is malicious, is in bad faith and procedural and the same would be oppressive and or prejudicial to the Applicant as a shareholder and Director of the 4th Applicant.

6. That in the interest of the Applicant and the 4th Respondent the court should make orders directing the 1st, 2nd and 3rd Respondents to make full disclosure to the Applicant of the financial transactions at Stanbic Bank Limited and Diamond Trust Bank Limited operated in the name of the 4th Respondent and the extent of any liabilities incurred that may affect the Applicant as a Director/Shareholder. He also prayed that an order be issued directing the 1st, 2nd and 3rd Respondents to carry out an audit of the accounts for the 4th Respondent for the period between June 2017 to June 2019 and to file an accounts audit report in court. The application is supported by the grounds on the face of the notice of motion and the affidavit of the applicant sworn on 10th October 2019.

7. The application was certified urgent and fixed for interpartes hearing on 23rd October 2019 at 2.00 p.m., but on the due date the Applicant sought for an adjournment on the ground that he had just been served with the replying affidavit sworn by the 2nd Respondent Mutua Charles Muthuri on 22nd October 2019 and that he needed time to respond to the issues raised in the affidavit.

8. The application for adjournment was granted to the Applicant but application for interim orders was disallowed and parties were granted leave to file further affidavits and directed to attend court for mention on 25th November 2019 for further directions. On 25th November 2019 directions were taken that applications be disposed by way of written submissions. The Applicant filed further affidavits sworn on 6th November 2019 and the 2nd Respondent filed further affidavit sworn on 20th November 2019.

9. The Applicant in his submission pointed out that he owns 25 shares out of 109 shares, 34 of which is held by the 2nd Respondent, 25 by the 3rd Respondent and 107 shares by the 1st Respondent. He submitted that the court had statutory powers to grant orders sought for Under Section 782(1) and (2). It was submitted that the process for removal of a Director of a company is provided for under Sections 139 and 144 of the Companies Act no 17 of 2015 but that the Applicant was not supplied with the reason for his removal and that the said removal is illegal malicious and oppressive and breached his right to be heard. The Applicant relied in the holding in **Kenya Hospital Association and 7 Others Vs Maxwell Otieno Odongo and 5 Others [2019] eKLR** where it was held inter alia that it cannot be the law that Section 141 gives a Director a right to protest by way of making representations for removal but at the same time does not require that the concerned Director be sufficiently informed of the reasons for the proposed removal. To hold otherwise is to render the right to protest Under Section 141 inefficacious of wholly redundant

10. The Applicant submitted that without the reasons for removal he is unable to make his representations and that the reasons in the Respondent's replying affidavit were an afterthought and unreasonable since they did not provide any form or basis of allegations. The Applicant argued that his fate was extensively discussed and sealed on 26th September 2019 when the Respondents met in breach of Section 139 of the Act which provides that only a meeting of shareholders has authority to call and vote for the removal of a Director and not a meeting of Directors. He argued that he was removed after he had filed the application herein and urged that he should be reinstated as a director pursuant to Section 3 of the Civil Procedure Act and Section 782(2) of the Companies Act.

11. The Applicant enumerated the nature of oppressive conduct on the part of the 1st, 2nd and 3rd Respondent which included from management of the affairs of the 4th Respondent excluding him from company meetings barring him from entering the company's premises. Refusing to pay him any dividends or profits from the company business and applying for credit facilities on behalf of the 4th Respondent without involvement of the Applicant. The Applicant also argued that his efforts to attend the company meetings were frustrated by sending of short notices if any was sent e.g. the notice for the meeting that was to be held on 2nd of June 2019 at 3.00 p.m. on a Sunday was sent to him at 12.58 p.m. on the same date.

12. The Applicant submitted that the Resolution to open another bank account of the 4th Respondent was passed on 4th April 2019 by the 1st, 2nd and 3rd Respondent in his absence and without consulting him and that it is on 22nd May 2019 that Stanbic Bank Limited that an application to process a loan facility for an amount of US Dollars 50,000 had been lodged with them. He said that the 1st, 2nd and 3rd Respondents tried to apply for a loan with Kenya Industrial Estates but it was rejected because there was no board resolution to that effect and that the Applicant had not approved of it. He said that it was not true that the credit facilities were denied because of his negative listing at CRB.

13. The Applicant further submitted that the memorandum and articles of association of the 4th Respondent provided for means through which notices can be sent to members either personally or through the post office and that the court should find that the WhatsApp messages should be found to be inadmissible

14. The Applicant while relying on the case of **Waweru Ngumi and 2 Others Vs Muturi Ndungu [2016] eKLR** urged the court to grant him leave to file a derivative action under Section 238(4) of the Companies Act for reasons he had raised sufficient grounds for the same.

15. The Respondents in their submissions identified four issues for determination namely;

- a. Whether the removal of the Applicant as a Director of the 4th Respondent was in bad faith malicious and unprocedural.
- b. Whether the 1st, 2nd and 3rd Respondents have conducted the affairs of the 4th Respondent Company in an oppressive manner that is prejudicial to the Applicant.
- c. Whether the Applicant should be granted leave to file a derivative action in the name of the 4th Respondent company as against the 1st, 2nd and 3rd Respondent

d. Who should bear the cost of the application.

16. In regard as to whether the removal of the Applicant as a director was in bad faith, malicious and unprocedural the Respondents submitted that Section 139 (1) and (2) of the Companies Act 2015 provides that a Director can be removed at any time before his office term expires by an ordinary resolution provided that a special notice is provided to that effect. It was submitted that the Applicant chose to ignore the provisions of Section 141(4) and (6) without any justifiable cause. That minutes containing reasons for his removal were served upon him together with a notice of removal and yet he did not bother to read the minutes or even formally asked to provide reasons for his removal. It was also argued that the Applicant wilfully neglected to attend the meeting held on 26th September 2019 in which the reasons for his removal were set out as per annexure MCM2 and he cannot purport that his right to be heard was violated.

17. The Respondents also relied on the case of **Kenya Hospitals and 7 Others Vs Maxwell Otieno Odongo and 5 Others 2019 eKLR** where the court observed that reasons should note given or furnished in any prescribed detail, form or elegance they should only be given before the end of the tenure to allow the said Director answer the reasons and protest removal if he so wishes. The Respondents further argued that the Applicant attended the meeting scheduled for 24th October 2019 and he was granted a chance to make his representations therein, and he cannot purport that he was not given reasons for his removal and a fair hearing. Furthermore, all the shareholders of the company including the Applicant were given a chance to vote for or against the resolution of the Applicant being removed as a Director of the 4th Respondent company. The Respondents argued that the Applicant's removal was conducted procedurally taking into consideration Section 139 and 141 of the Companies Act 2015 and the 4th Respondent's articles. That it was clearly evident that the Applicant breached his duties as a director by failing to attend several meetings despite receiving notices.

18. The Respondent's submissions in regard to the 2nd issue was that the complainant must demonstrate that he has been oppressed. they argued that the Applicant had always been invited to the 4th Respondent's meeting but has always opted to disregard the said notices out of his own will. The annexed sum of the notices sent to the Applicant as MCM5 and MCM6. The Respondents submitted that Article 40 of the 4th Respondent's Articles of Association provided that applying for a loan only needs a majority vote of the Directors and not approval of all directors and therefore the Applicant having chosen not to attend a meeting where the majority vote resolved to apply for a loan, such a resolution is deemed to have been validly passed. It was further submitted that the Applicant misled the court to say that he had been denied access to the company's premises and yet he had been invited for meetings of the same company. On the issue on whether notices for meetings were sent through WhatsApp, emails and telephone calls, the Respondent argued that the Applicant had also used the same means to call for meetings as evidenced in MCM1 and it is in bad taste and a demonstration of bad faith on the part of the Applicant to state that the Articles of the company do not provide for notices to be sent through WhatsApp messenger and that he never received the said notices.

19. On whether the Applicant should be granted leave to file a derivative action in the name of the 4th Respondent company as against the 1st, 2nd and 3rd Respondents, the Respondents submitted that the Applicant's opposition of his removal as a director is solely for his own personal benefit and not on behalf of the company. The case of **Altaf Abdulrasul Dadani Vs Amini Akberazi & 3 Others, Nairobi Nairobi (milimani) HCCC No.913 of 2002 [2004] 1KLR 95** and **Ghelani Metals Ltd and 3 Others Vs Ellesh Ghelani Natwarlal and Another [2017] eKLR** was relied on by the Respondent in their submissions that there was absolutely no act or omission involving negligence, default, breach of duty or breach of trust by the Respondents that would call for a derivative action against them.

20. The Respondents submitted that borrowing of loans and facilities to further the objects of the company was within the mandate of the 4th Respondent as established by its memorandum and articles of association and only required a simple majority vote of the Directors. They argued that all loans if any were borrowed on behalf of the 4th Respondent for the sole purpose of ensuring that the operations of the company were up and running and were obtained within the company's financial standing. It was submitted that the claim that the 4th Respondent had not been complying with NHIF, NSSF and PAYE was an afterthought in the Applicant's further affidavit and contradicted averments in his supporting affidavit that the company was not in operation. The Respondents said this was to show that the Applicant is after his own vendetta and not after interest of 4th Respondent. The Respondents submitted that no prima facie fraud had been shown or proved against the Respondents so as to amount to wrong doings against the company.

21. As to who should bear the cost of the Application the Respondents submitted that costs are meant to reimburse the successful party for amounts expended on the case.

22. In conclusion the Respondents submitted that this honourable court has no reason to intervene in the decision making process of the 4th Respondent company as no wrong doing has been made on the part of the Directors to warrant such interventions. They relied on the case of **Grace Wanjiru Munyinyi and Another Vs Gideon Waweru Githunguri and 5 other [2011]**

23. In consideration of the application and submissions by the parties herein the issues for determination are those that had been framed by the Respondent namely:

a. Whether the removal of the Applicant as a Director of the 4th Respondent was in bad faith malicious and unprocedural.

b. Whether the 1st, 2nd and 3rd Respondents have conducted the affairs of the 4th Respondent Company in an oppressive manner that is prejudicial to the Applicant.

c. Whether the Applicant should be granted leave to file a derivative action in the name of the 4th Respondent company as against the 1st, 2nd and 3rd Respondent

d. Who should bear the cost of the application.

24. On whether the removal of the Applicant as a Director of the 4th Respondent was done pursuant to Section 139(2) and 141(4) of the Company's Act of 2015, the Applicant claims that the notice did not inform him of his rights and did not give him reasons for his removal as a Director to enable him make representations at the meeting. The Respondents on the other hand have shown that the Applicant was invited for a meeting of the Board of Directors to be held on 26th September 2019 and one of the agenda of that meeting was to consider special notice for removal of the Director. The Applicant did not attend the meeting and did not send an apology. Following that meeting it was resolved that a special notice to convene a general meeting be held on 24th of October and the grounds were set out in the minutes of 26th September 2019. The notice to convene a special general meeting and the minutes containing the reasons for the Applicant's removal as a Director were served on him on 27th September 2019 notifying him on the meeting to be held on 24th October 2019 at 5.00 p.m. This court therefore finds like in the case of **Kenya Hospital Association and 7 Others Vs Maxwell Otieno Odongo and 5 Others 2019 eKLR** that the minutes of 26th of September 2019 containing the reasons for removal of the Applicant were sufficient to allow him answer to the reasons and protest the removal if he so wished.

25. On issues (b) and (c) Section 238 of the Companies Act provides as follows:

238. Interpretation: Part XI

(1) In this Part, "derivative claim" means proceedings by a member of a company—

(a) in respect of a cause of action vested in the company; and

(b) seeking relief on behalf of the company.

(2) A derivative claim may be brought only—

(a) under this Part; or

(b) in accordance with an order of the Court in proceedings for protection of members against unfair prejudice brought under this Act.

(3) A derivative claim under this Part may be brought only in respect of a cause of action arising from an actual or proposed act or omission involving negligence, default, breach of duty or breach of trust by a director of the company.

(4) A derivative claim may be brought against the director or another person, or both.

(5) It is immaterial whether the cause of action arose before or after the person seeking to bring or continue the derivative claim became a member of the company.

(6) For the purposes of this Part—

a) "director" includes a former director;

b) a reference to a member of a company includes a person who is not a member but to whom shares in the company have been transferred or transmitted by operation of law.

26. I have perused the Applicant's application, the supporting affidavit and the annexures thereto as well as his further affidavit and established that his discontent with his fellow directors stems back to late 2018 and it appears that although he claims to have been excluded from the affairs of the 4th Respondent he deliberately failed to attend meetings and he has given the reasons in his further affidavit as lack of sufficient notice, notices contrary to the Memorandum and Articles of Association of the 4th Respondent i.e. through WhatsApp and email. Looking through the Applicant's annexures there is nothing to show that he attempted to raise his complaints with his fellow Directors. He wrote letters and emails to the Manager Stanbic Bank, Registrar of Companies, the Managing Director Diamond Trust Bank, one Joyce Chepngetich to make inquiries about the running and status of the 4th Respondent. The Applicant did not show that he responded to the emails/WhatsApp/ text messages that invited him for any of the company meetings. The 1st, 2nd and 3rd Respondents could not have been expected to abdicate their duties as Directors of the 4th Respondent because of the indifference of the Applicant herein.

27. The 1st, 2nd and 3rd Respondents have shown that the running of the 4th Respondent in terms of applying for credit facilities only required a majority vote and the Applicant did not controvert that fact. The Memorandum and Articles of Association of the 4th Respondent were not availed to this court to enable it establish that the conduct of the 1st, 2nd and 3rd Respondents were contrary to the said Memorandum and Articles of Association. The factors that guide the court in granting leave for derivative claim are well captured in the case of **Isiah waweru Njumi and 2others Vs Muturi Ndungu 2016 eKLR** as follows

“...Among other things, the Court considers the following factors:

(a) Whether the Plaintiff has pleaded particularized facts which plausibly reveal a cause of action against the proposed defendants. If the pleaded cause of action is against the directors, the pleaded facts must be sufficiently particularized to create a reasonable doubt whether the board of directors' challenged actions or omissions deserve protection under the business judgment rule in determining whether they breached their duty of care or loyalty;

(b) Whether the Plaintiff has made any efforts to bring about the action the Plaintiff desires from the directors or from the shareholders. Our Courts have developed this into a demand or futility requirement where a Plaintiff is required to either demonstrate that they made a demand on the board of directors or such a demand is excused;

(c) Whether the Plaintiff fairly and adequately represents the interests of the shareholders similarly situated or the corporation. Hence, a shareholder seeking to bring a derivative suit in order to pursue a personal vendetta or private claim should not be granted leave. In the American case of Recchion v Kirby 637 F. Supp. 1309 (W.D. Pa. 1986), for example, the Court declined to let a derivative lawsuit proceed where there was evidence that it was brought for use as leverage in plaintiff's personal lawsuit;

(d) Whether the Plaintiff is acting in good faith;

(e) Whether the action taken by the Plaintiff is consistent with one a faithful director acting in adherence to the duty to promote the success of the company would take;

(f) The extent to which the action complained against – if the complaint is one of lack of authority by the shareholders or the company – is likely to be authorised or ratified by the company in the future; and

(g) Whether the cause of action contemplated is one that the Plaintiff could bring as a direct as opposed to a derivative action.”

28. The Applicant produced evidence that credit facilities were sought for from Stanbic Bank and Kenya Industrial Estates and the 2 institutions sought for his particulars and his signatures to approve the loan that 1st, 2nd and 3rd Respondents had applied for, this Action by the 1st, 2nd and 3rd Respondents in the view of this court has not been shown to be an act involving negligence, default, breach of duty or breach of trust in the running of the affairs of the 4th Respondent.

29. In conclusion the Applicant having failed to substantiate his claim under Section 238, 780 and 782(2) of the Companies Act this court comes to the conclusion that the application does not have merit and the same is dismissed with costs to the 1st, 2nd and 3rd Respondents.

HON.ANNE ADWERA ONGINJO

JUDGE

DATED AND DELIVERED AT NAIROBI VIA EMAIL THIS 27TH DAY OF APRIL 2020 DUE TO THE PRESIDENTIAL DIRECTIVES ISSUED ON 15TH MARCH 2020 AND SUBSEQUENTLY ON 7TH APRIL 2020 DUE TO COVID-19 PANDEMIC.

HON.ANNE ADWERA ONGINJO

JUDGE