



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

MISCELLANEOUS APPLICATION NO. E605 OF 2019

HEMANT DEVJI JETHWA.....PLAINTIFF/APPLICANT

-VERSUS-

THE AFRICAN BOOT COMPANY LIMITED.....DEFENDANT/RESPONDENT

RULING

1. This ruling is in respect to the application dated 20th November 2019 wherein the applicant seeks order that: -

1. Spent.

2. That this honourable court be pleased to issue an injunction against the respondents either by themselves or their agents employees or any persons howsoever working under their direction or instructions from changing, altering or in any way interfering with the shareholding and directorship of Africa Boot Company Limited.

3. That this honourable court be pleased to appoint, a Certified Public Accountant or such other competent inspector as the court may deem fit as an inspector to inspect the affairs of the companies and to report to the court thereon in respect to ascertain the:
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a) Position of the members in the register and index thereof.

b) Position of books of accounts, bank accounts and signatories thereof.

c) Position in respect of appointment of a removal of directors since registration of the said companies.

d) Position in respect of meetings including Annual General Meeting, Special meetings called out or held by the company if at all and resolutions if any and minutes thereof.

e) Appointment of and removal of Auditors if at all.

f) Appointment of and removal of Company Secretaries.

g) Transfer of shares and acquisition of membership to the companies since registration of the said companies.

h) Position in respect to appointment of service providers and contracts entered into by the said companies.

i) Establish legal and financial standing of the companies.

4. That cost of this application be provided for in the cause.

2. The application is brought under Section 786(1), (a) (ii) and 478(8) of the Companies Act. It is supported by the affidavit of **Hemant Jethwa**, who describes himself as the company's shareholder and former Director, and is premised on the grounds that: -

a) The applicant is a minority shareholder in the respondent and was formerly a director before he was jettisoned by the majority shareholders.

b) The majority shareholders having been running the company in an opaque and clandestine manner without involving the applicant and he has been left in the dark regarding most of the affairs of the company.

c) The applicant has been sidelined from the company and he has been denied the right to inspect the books and he is only given statements of accounts to sign without much information.

d) That the applicant has also been reliably informed that the records at the registrar of companies are being altered with the help of unscrupulous officials working at the registrar of companies.

e) That the applicant has information that the directors have opened private accounts to which they are directing monies belonging to the company.

f) That the annual returns to the registrar of companies are being misrepresented and the applicant is apprehensive that the company is not paying its taxes as it should be doing in accordance with the law.

g) That the inspection will enable the applicant confirm the status as to the appointment of an auditor and compliance of Section 159 of the Companies Act in order to protect the interests of the applicant's investments and too confirm whether there are any conflicts of interest, and the remuneration set for the auditor and how the auditor was appointed, if in compliance with the law. This information has been kept away from the applicant.

3. The company opposed the application through the replying affidavit of its Director/shareholder **Mr. Jaybharat Devji Jethwa** who avers that the company is a family business established in 1927 wherein the applicant and his wife have equal shareholding to the rest of his brothers and their wives.

4. He states that the applicant was a Director in the company until the year 2015 when he was not re-elected as a Director but that family has not excluded him from participating in the company as a shareholder. He further states that the company records are available in the shelves in the main shop located in the Central Business District and are therefore accessible to the applicant, shareholders and employees of the company.

5. He states that the applicant had access to all the records of the company until the year 2014 when he was denied access to the invoice file and cheque books when it was discovered that he would mark invoices and cheque counterfoils with question marks in red ink a habit he refused to stop. He contends that by reason of the applicant's conduct, he was removed as a Director and stopped from accessing the invoices and cheque books.

6. He avers that auditors are appointed at every Annual General Meeting by majority vote and that there is no collusion between the current Directors and the auditors. He further avers that the current suppliers of goods are independent businesses with no relations to persons in the company. He avers that the company's accounts have recently been audited and cleared by the Kenya Revenue Authority. He further avers that the applicant has been receiving his salary and dividends from the company despite the fact that he is not engaged in the day to day running of the company's affairs.

7. The applicant filed a supplementary affidavit in response to the replying affidavit wherein he states that the replying affidavit is riddled with untrue statements. He accuses the company's deponent of perjury and states that the company in being run in a clandestine manner with all voices of accountability silenced.

8. He contends that he was kicked out of directorship in 2016 in a well pre-planned coup after which he has been marginalized and denied access to crucial documents. He accuses the Director of failure to provide particulars of the documents that he alleges were marked in red ink or the alleged parallel business that he conducted alongside the company business. He further accuses the Directors of siphoning the company resources by opening secret accounts.

9. He denies the claim that he has been receiving dividends and adds that he has been denied dividends under the guise that the company is making losses. It is the applicant's case that unless the court intervenes and orders for an independent audit, his oppression and marginalization will continue and that it is just a matter of time before the company, that has been in existence for several decades, is run down. He maintains that the directors will not suffer any prejudice if an independent audit is carried out so as to save the company from insolvency.

10. In a rejoinder to the supplementary affidavit, the company's deponent filed a further affidavit dated 9th June 2020 wherein he states that the Company's Board of Directors decided not to re-elect the applicant out of their own free will after receiving complaints from members of the company.

11. He states that as a shareholder of the company, the applicant attends the company's Annual General Meetings where all members are supplied with the company's financial statements and auditor's report. He states that the applicant has been frustrating the affairs of the company and making demands for payment of his shares in the company.

12. Parties canvassed the application by way of written submissions which I have considered. The main issue for determination is whether the applicant has made out a case for the granting of the orders sought in the application.

Injunction

13. The principles for granting orders of injunction were settled in the case of *Giella v Cassman Brown & Company Limited* (1973) E A

358, where the court expressed itself on the condition's that a party must satisfy for the court to grant an interlocutory injunction as follows: -

"First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience."

14. In the present case, the applicant seeks orders to restrain the respondents from altering or interfering with the shareholding of the company. Having regard to the above stated principles of injunction, I am not satisfied that the applicant has demonstrated that the respondent intends to interfere with the company's shareholding so as to warrant the granting of orders of injunction.

15. What emerges from the arguments presented by the parties herein is a scenario where one-member shareholder of the company is not in agreement with the manner in which the company is being managed after his removal as a Director. I note that the parties herein are engaged in accusations and counter accusations over the running of the company's affairs. This court did not lose sight of the fact that the company in question is a family business where ideally, disputes should be resolved in an amicable manner. This is however not to say that such disputes cannot be adjudicated upon by the court.

Appointment of Certified Public Accountant.

16. The applicant also sought the appointment of a certified public accountant to inspect the company's books and make a report to the court regarding the various issues affecting the company.

17. It is to be noted that prior to and following the removal of the applicant as a Director of the company, there was a buildup of mistrust between the said Directors and members of the company.

18. As I have already noted in this ruling, the parties herein have made accusations and counter accusations against each other regarding the management of the company's affairs.

19. Even though the respondent states that it has consistently supplied the applicant with financial statements and auditors reports and the Annual General Meetings Minutes, it is apparent that the applicant is not satisfied with such reports and still accuses the respondent of colluding with the auditors.

20. Section 478(8) and 786(1) (a) (ii) of the Companies Act stipulates as follows: -

"(8) If a company refuses to allow an inspection as requested under subsection (4), or to provide a copy of a record requested under subsection (5), the Court may, on the application of a person affected by the refusal, make an order compelling the company to allow an immediate inspection of the records, or to provide that person with a copy of the requested record."

"Section 786. Investigation of company's affairs on application of members"

(1) The Court may appoint one or more competent inspectors to investigate the affairs of a company and to report on those affairs in such manner as the Court directs—

(a) in the case of a company having a share capital — on the application either of—

(ii) members holding not less than one-tenth of the nominal value of the company's share capital."

21. Having regard to the above cited provisions and taking into account the mistrust and suspicions that exist among the Company's Director and the applicant, this court is of the view that such suspicions can only be debunked through an independent audit of the company's books.

22. Consequently, I allow the prayer for the appointment of a Certified Public Accountant to inspect the company's books and file a report before this court within 60 days from the date of his appointment.

23. Towards this end, this court directs the Chairman of ICPAK to appoint an independent auditor/accountant to inspect the book of the company herein in order to ascertain the following: -

a) Position of the members in the register and index thereof.

b) Position of books of accounts, bank accounts and signatories thereof.

c) Position in respect of appointment of a removal of directors since registration of the said companies.

d) Position in respect of meetings including Annual General Meeting, Special meetings called out or held by the company if at all and resolutions if any and minutes thereof.

e) Appointment of and removal of Auditors if at all.

f) Appointment of and removal of Company Secretaries.

g) Transfer of shares and acquisition of membership to the companies since registration of the said companies.

h) Position in respect to appointment of service providers and contracts entered into by the said companies.

i) Establish legal and financial standing of the companies.

24. The costs of the audit shall be shared equally by the parties. I make no orders as to the costs of this application.

Dated, signed and delivered via Microsoft Teams at Nairobi this 17th day of December 2020 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:

Miss Munene for the Respondent

Court Assistant: Sylvia