



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
MILIMANI HIGH COURT
CIVIL CASE NO 133 OF 2017
IN THE MATTER OF : KEVIN INTERNATIONAL GROUP (AFRICA) LIMITED
AND
IN THE MATTER OF COMPANIES ACT 2015
AND
IN THE MATTER OF AN APPLICATION UNDER SECTION 780 OF THE COMPANIES ACT
IN THE MATTER OF: QI ZHECN CAI
QI ZHEN CAI.....APPLICANT
VERSUS
QINWEN HE.....1ST RESPONDENT
XIAO HONG YU.....2ND RESPONDENT
KEVIN INTERNATIONAL GROUP (AFRICA) LTD.....3RD RESPONDENT

RULING

1. This is an Interlocutory Application within proceedings brought under section 780 of The Companies act. In the Motion dated 29th March 2017 Qi Zhen Cai (the Applicant) seeks the following prayers:-

1. *Spent*

2. This Honourable Court be pleased to issue a temporary injunction restraining the 1st and 2nd Respondent either by themselves, their servants, agents, or employees fro, threatening, harassing or publishing, posting, writing or convey in any social media and/or internet sites any information that is meant to defame or paint the Applicant in bad light among the Chinese community or general public pending hearing and final determination of this application.

3. This Honourable Court be pleased to issue a temporary injunction restraining the 1st and 2nd

Respondent either by themselves, their servants, agents, or employees from, threatening, harassing or publishing, posting, writing or convey in any social medial and/or internet sites any information that is meant to defame or paint the Applicant in bad light among the Chinese community or general public pending hearing and final determination of this suit.

4. This Honourable Court be pleased to issue an order directing the 1st and 2nd Respondents to immediately procure the release of the 3rd Respondent's motor vehicle registration number KCF 403S currently impounded at Jomo Kenyatta International Airport Police Station.

5. This Honourable Court be pleased to issue an order against the 1st and 2nd Respondents to disclose all the bank accounts opened in the name of the 3rd Respondent locally and in China and to further avail certified copies of their bank statements for the year 2015, 2016 and 2017.

6. This Honourable Court be pleased to compel the 1st and 2nd Respondents to table the 3rd Respondent's statement of accounts for the year 2016 for scrutiny by the Applicant as well as the court pending the hearing and determination of this suit.

7. The costs of this application be provided for.

2. Kevin International Group (Africa) Ltd (The Company or 3rd Respondent) is a Company duly incorporated in Kenya with the following Directors and Shareholders:-

1. Zhuangu

2. Qizhen Cai

3. Qinwen He

4. Xiao Hong Yu

5. Samson Vaati Musembi

3. Oinwen HE (the 1st Respondent) is the majority shareholding with 6500 shares out of the 10000 ordinary shares that have been issued. Xiao Hong Yu (the 2nd Respondent) also holds substantial shares (2000 shares).

4. The Applicant's case is that she is engaged in the business of exporting Flowers using the Company as the vessel of trade. She avers that she entered into an oral agreement with the 1st Respondent with regards to profits from the Flower Export Business and this would be 50% of the shares. In addition, the Plaintiff would be entitled to USD 2000 being her monthly allowance as a Director of the Company.

5. It is alleged that sometime in 2016, the Applicant fell out with the 1st and 2nd Respondents over payment of her share of profits as well as the manner in which the two run the affairs of the Company. Further that the two Respondents declined to reimburse to her USD 2,261 incurred in the conduct of the business of the Company.

6. That would not be all to the Applicant's grievances. That the 1st and 2nd Respondents accused the Applicant of illegally being in possession of the Company's vehicle (registration KCF 403S) and caused it to be seized by the police and impounded at Jomo Kenyatta International Airport Police station. This seizure, it is averred, caused great public humiliation and ridicule to the Applicant. In addition, the 1st and 2nd Respondents are accused of maligning the Plaintiff in social media.

7. In the main Application, the Applicant seeks the following prayers:-

- a) This Honourable Court be pleased to issue orders compelling the 1st and 2nd Respondent to make payment of USD 70,038.83 being the profits rightfully entitled to the Plaintiff as at the close of business on 25th September, 2016.
- b) This Honourable Court be pleased to issue orders compelling the 1st and 2nd Respondents to make payment of USD 2,261 being the expenses incurred in the conduct of the 3rd Respondent's affairs.
- c) This Honourable Court be pleased to issue a permanent injunction restraining the 1st and 2nd Respondents either by themselves, their servants, agents, or employees from contacting, calling, or sending any messages (including e-mail or on social media), threatening, harassing, destroying personal property, or disturbing the peace of the Plaintiff.
- d) This Honourable court be pleased to issue orders compelling the 1st and 2nd Respondents to cease and desist all acts of oppression against the 3rd Respondent's minority shareholders.
- e) The costs consequent upon this Petition be borne by the Respondents.
- f) This Honourable Court do make any such other or further orders as it may deem just and expedient in the circumstances in enforcing the violation of fundamental rights of the Plaintiff.

8. The contents of the main pleadings are reiterated as evidence in support of the Motion now before Court. The evidence is in the affidavit of the Applicant sworn on 28th March 2017.

9. The Respondents filed a joint reply through the Replying affidavit of the 1st Respondent sworn on 14th April, 2017. In it the Respondents assert that the duties and responsibilities of the Applicant are limited to those of a Director. The Respondents deny that the Applicant is entitled to 50% of profits of the Company's Flower Business or a monthly allowance of USD 2600.

10. The Respondents depone that the sale records annexed to the Applicant's Affidavit have never been submitted to the Company and are unsubstantiated. Further that the alleged sale records contains various expenses which were not authorized by the Company and are not supported by receipts or other documents.

11. The Respondents state that the Company accounts for the financial years 2015 and 2016 were under audit and which exercise had not been concluded by the time of the making of the 1st Respondent's Affidavit on 14th April, 2017. For that reason, it is asserted, the Company cannot determine if it had made profits for those two years.

12. The 1st and 2nd Respondents deny directing funds of the 3rd Respondent to a Company known as Fu Yao Auto Safety Glass.

13. Authority on the part of the Applicant to incur expenses on behalf of the Company is also denied as is any hostility towards her.

14. In respect to the Motor vehicle registration KCF 403 S now held at Jomo Kenyatta International Airport Police station, the Respondent answer is that the vehicle belongs to the Company and was not assigned to the Applicant for her personal or official use. In respect to ownership thereof the Deponent has annexed a copy of the log book showing the registered owner as Kevin International Group (Africa) Limited, the Company.

15. The protagonist agree that, in the main, the Application that the Court is being asked to consider is one for temporary injunction and the applicable tests are those set out in **GIELLA VS. CASSMAN BROWN** [1973] EA 358 for the grant of an Interlocutory Injunction as being:-

a) An Applicant must show a prima facie case with a probability of success.

b) An Interlocutory Injunction will not normally be granted unless the Applicant might otherwise suffer irreparable loss which would not be adequately be compensated by an award of damages.

c) If the Court is in doubt, it will decide an application on the balance of convenient.

16. Has the Plaintiff made out prima facie case with a probability of success? In answer thereof, the case to be assessed is that set out in the main pleading.

17. This Court has keenly looked at the main Application and identified the following to be the grievances of the Applicant:-

(i) That the Respondents have deprived her of her share of profits in the Flower Business she has conducted on behalf of the Company.

(ii) That she is entitled to USD 2261 being expenses she has incurred in the conduct of the 3rd Respondent's affairs.

(iii) That the 1st and 2nd Respondents have conducted the affairs of the Company in a manner that is oppressive to the minority shareholders.

18. At a glance (and with caution that a final determination must be left to the Trial Court), it seems to this Court that the substantial grievances of the Applicant stem from her alleged engagement in the business of exporting Flowers with the Company. The nature of engagement was elaborated in her supporting Affidavit.

19. The Applicant would purchase Flowers from the Kenyan Farmers, arrange for preservation, transport and eventually export them to China. On the other hand, the 1st and 2nd Respondents would be responsible for the sales in China. The consideration for this arrangement was that the proceeds from the Flower Business would be shared on 50%: 50% ratio. In addition she would be entitled to a monthly allowance of USD 2600 meant to cater for her daily expenses.

20. Now, the provisions of Section 780 of The Companies Act are:-

(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.

(2) In this section, "member", in relation to a company, includes a person who is not a member of the company but is a person to whom shares of the company—

(a) have been transferred; or

(b) have been transmitted by operation of law.

21. I give regard also to the provisions of Sections 781, 782 and 783 which are as follows:-

781.(1) This section applies to a company in respect of which—

- (a) the Attorney General has received an inspector's report under Part XXX;
- (b) the Attorney General has exercised the powers under [section 1000](#) or 1001;--
- (c) the Capital Markets Authority or an officer authorised by it has exercised a power conferred by section 13 or 13A of the Capital Markets Act (Cap. 485A) to obtain information or to carry out an inquiry; or
- (d) the Capital Markets Authority has received a report from an officer authorised to carry out an inquiry under section 13A of that Act.

(2) The Attorney General may make an application for an order under [section 782](#) if satisfied—

- (a) that the affairs of a company to which this section applies are being, or have been, conducted in a manner that is oppressive or is unfairly prejudicial to the interests of its members generally or to a section of its members; or
- (b) that an actual or proposed act or omission of such a company (including an act or omission on its behalf) is or would be oppressive or so prejudicial.

(3) The Attorney General may make such an application in addition to, or instead of, making an application for the liquidation of the company.

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) authorise 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.-

783.(1) If an order of the Court made under [section 782](#)—

- (a) alters the company's constitution; or

(b) authorises or directs the company to make any, or any specified, alterations to its constitution, the company shall, within fourteen days after the making of the order or such extended period as the Court may allow, lodge for registration with the Registrar a copy of the order.

(2) If a company fails to comply with subsection (1), the company, and each officer of the company who is in default, commits an offence and on conviction is liable to a fine not exceeding two hundred thousand shillings.---

(3) If, after a company or any of its officers has been convicted of an offence under subsection (2), the company continues to fail to lodge the copy referred to in subsection (1), the company, and each officer of the company who is in default, commit a further offence on each day on which the failure continues and on conviction are each liable to a fine not exceeding twenty thousand shillings for each such offence.

22. Reading these provisions together there would be two persons entitled to apply for protection against oppressive conduct and unfair prejudice to interests of members of a Company generally or to a section thereof. These would be a member of a Company or the Attorney General. Under Section 780(2) a member includes a person (though not a member) to whom shares of a Company have been transferred or have been transmitted by operation of law.

23. Section 92 of the Act provides how persons become members of the Company and this is what it states:-

(1) The subscribers to the memorandum and articles become members of the company on the registration of the company.

(2) As soon as practicable after the registration of the company, it shall enter in its register of members the names and addresses of persons who subscribed to its memorandum and the date on which they became members of the company.

(3) Any other person who later agrees to become a member of a company becomes a member of the company when the person's name is entered into the register of members.

24. It is however my understanding of the provisions of Section 780 of The Act that when a member of Company moves Court for relief under those provisions, the member does so in his/her capacity as member, that is, as member qua member.

25. In paragraph 5 of her Pleading, the Applicant avers;-

“The Plaintiff is a minority shareholder of the 3rd Respondent and is engaged in the business of exporting Flowers using the 3rd Respondent as the vessel of trade”

This could be understood to mean any of the following in respect to the Flower Business:-

- (i) That the relationship between the Applicant and the Company was that of principal and agent.
- (ii) The Applicant was an independent Contractor to the Company.
- (iii) The Applicant and Company were partners in the Flower Business.

26. What is clearer is that the Applicant was not so engaged in her capacity as a member of the Company. It would be for that reason that she would be entitled to 50% of the profits (or so she claims) when she only held a total of 5% shares.

27. Her grievance in respect to the Flower Business (which is the substantial grievance) is not a grievance

purely as a member of the Company and the Trial Court will need some convincing that the provisions of Section 780 have been properly invoked by the Applicant. For now, the Court takes the view, that on the material before it this far, the applicant stands on shaky ground and in that respect has not made out a prima facie case with a probability of success.

28. That said the Applicant also pleads that the 1st and 2nd Respondents, as majority shareholders, have ran the affairs of the Company in a manner that is oppressive to her as a minority. This would be a matter for investigation under a Section 780 proceeding. However, to be entitled to the Interim reliefs sought such as disclosure of Bank Accounts and scrutiny of Accounts, the Applicant needed to demonstrate that the 1st and 2nd Respondents have unlawfully opened Bank Accounts in the name of Company and concealed this from her or evidence suggesting this or that the Plaintiff is unable to access the accounts of the Company in her capacity as shareholder and Director. Unfortunately for the Applicant, she has not provided any evidence to back those allegations.

29. On the prayer seeking to restrain the 1st and 2nd Respondent from threatening, harassing, publishing, posting, writing or conveying in any social media and/or internet sites any information that is meant to defame or paint the Applicant in bad light amongst the Chinese community or General Public, that seems to me to be a matter more suited for a Civil Court entertaining a Tortious Action than a Court dealing with an application under Section 780 of The Companies Act.

30. All in all the Notice of Motion of 28th March 2017 lacks merit and is hereby dismissed with costs.

Dated, Signed and Delivered in Court at Nairobi this 13th day of October, 2017.

F. TUIYOTT

JUDGE

PRESENT;

Gatheru h/b Kinyanjui for Applicant

Agwenyi for Defendant

Alex - Court clerk