



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

MISCELLANEOUS CIVIL APPLICATION NO. 328 OF 2014

IN THE MATTER OF THE COMPANIES ACT, CAP. 486

&

IN THE MATTER OF ASHARI APARTMENTS LIMITED

RITA MARIA HURLIMANN.....PLAINTIFF

-VERSUS-

ROGER MWABONJE KADOSHO1ST DEFENDANT

ASHARI APARTMENTS LIMITED.....2ND DEFENDANT

R U L I N G

1. The Application before this Court is the Plaintiff's Originating Notice of Motion dated **6th June 2014** and filed in Court on **11th July 2014**. It is expressed to be brought under Sections 125, 146-149, 155-159, 162, 165-169 and 197-198 of the Companies Act, 6th schedule of the Companies Act, Rules 3 and 8 of the Companies (High Court) Rules, Section 3A of the Civil Procedure Act and Order 51 Rule 1 of the Civil Procedure Rules.
2. The Application is based on the grounds stated in the application and is supported by the Affidavit of the Plaintiff sworn on **6th June 2014** as well as her further Affidavit sworn on...
3. The Plaintiff is seeking for various orders under the companies Act, twelve (12) to be precise, on the basis that she has been sidelined and excluded by the 1st Defendant from participation in the affairs of the 2nd Defendant Company. The essence of the orders sought for by the Plaintiff are to compel the Defendants to allow her to fully participate in the running of the 2nd Defendant Company and to compel the 1st Defendant to disclose to the Plaintiff and the Court the financial statements of the company. The Plaintiff is also seeking for orders that a forensic audit be conducted.

Background of the Application

4. The 2nd Defendant (herein the Company) came into existence pursuant to the certificate of incorporation dated 4th September 2001. The Plaintiff and the 1st Defendant are the only two shareholders and directors of the Company each holding 50% of the shares. The company is

- engaged in the hotel and tourism industry and owns the hotel known as Ashari Hotel. The Plaintiff and the 1st Defendant are married to each other but are presently estranged and are involved in Divorce proceedings in Nairobi High Court Divorce Cause No. 73 of 2009.
5. The Plaintiff avers that she solely raised the funds used to purchase the properties owned by the Company. She only included the 1st Defendant as a co-owner of the said properties for convenience and as a spouse. The Plaintiff further avers that she single handedly raised and provided the funds used to incorporate, set up and commence the company including the hotel business.
 6. It is the Plaintiff's assertion that the personal relationship between her and the 1st Defendant as the only two directors and shareholders of the company has completely deteriorated. She avers that the 1st Defendant has used this and the fact that she has been ailing, as a basis for sidelining, preventing and locking her out of the activities, operations and business of the Company.
 7. It is the Plaintiff's case that in the discharge of his duties and in the course of running the Company, the 1st Defendant is required by law to involve her in all decisions made and to make available all financial statements of the Company. However, it is the Plaintiff's position that in breach of the said duty, the 1st Defendant has consistently failed to forward to her any balance sheets, Audit reports or any other similar documents to which she is entitled to as a shareholder and a Director of the Company. As a result, it is the Plaintiff's contention that she is unaware of the state of the operations of the 2nd Defendant including the income and profits received over the years.
 8. The Plaintiff states that together with the 1st Defendant they had opened a Bank account at the Kenya Commercial Bank, Mtwapa and which Account was to operate as the business account of the Company. It is the Plaintiff's case that in breach of his fiduciary duties to the Company and to herself, the 1st Defendant has prevented and locked her from accessing the Company's bank accounts despite the fact that she is a co-signatory to the said account. It is further the Plaintiff's case that she has no information on the identity and status of the said accounts and which the 1st Defendant appears to have since changed or closed.
 9. The Plaintiff further states that she has requested for Company meetings on several occasions but the 1st Defendant has ignored such requests and has refused to convene any meeting. It is also averred by the Plaintiff that upon conducting personal searches at the Registrar of Companies' offices, her Advocates learnt that the 1st Defendant has never filed annual returns for the Company for all the years that the company has been in existence.
 10. It is the Plaintiff's case that the 1st Defendant is determined to prevent her from taking part in the affairs of the company despite the fact that she is the only financial contributor in the incorporation, setting up of the company and purchase of the Company's assets. It is also the Plaintiff's case that as a 50% shareholder in the Company, the affairs of the company are being conducted by the 1st Defendant in total secrecy and in a manner that is oppressive to her.

The Defendants' Case

11. The Defendants opposed the application vide the Replying affidavit of the 1st Defendant sworn on 25th September 2014. The 1st Defendant confirms that he is a shareholder and director of the company. He however denies the allegations made by the Plaintiff to the effect that he has sidelined her from the affairs of the Company.
12. It is the 1st Defendant's assertion that the Company is not engaged in any business because it does not own property. It is also his assertion that the Company does not own the guest room business known as Ashari Apartments. The 1st Defendant attached a copy of the Certificate of Registration of Ashari Apartments (marked as "R-1". The Certificate indicates that the Plaintiff and the 1st Defendant own Ashari Apartments.
13. It is the 1st Defendant's contention that the company is not trading because it was meant to be a partnership between the Plaintiff and the 1st Defendant as husband and wife. It is also his contention that since their separation in 2009, he has lived on plot No. 7467/1/MN and 7466/1/MN registered in their joint names and has been doing business as an individual. The 1st Defendant

- avers that the division of the aforesaid properties is already subject of proceedings in the High Court at Mombasa.
14. It is the 1st Defendant's case that the Plaintiff is well aware that the 2nd Defendant owns no property and that she is just using the Court process to target the above named properties. It is further the 1st Defendant's case that before the estrangement in 2009, the Plaintiff exclusively controlled the guest room business and therefore she is the one to account for matters arising within the period between incorporation in 2001 to 2009.
 15. The 1st Defendant avers that the Plaintiff's allegations that she demanded for the 2nd Defendant's meetings is misleading because no meeting was ever demanded and besides the company was not operational. The 1st Defendant further avers that the Plaintiff's allegation that she is a signatory of the Bank account in question and that she has been denied access to the same is misleading. It is the 1st Defendant's position that signatories of a Bank account cannot be denied access to the Bank unless such a person ceases to be a signatory.
 16. In addition to responding to the Plaintiff's application, the 1st Defendant in his affidavit raised the issue of transferring this suit to Mombasa. It is the 1st Defendant's case that sections 12 and 13 of the Civil Procedure Act requires suits to be instituted where the subject matter is situated. It is further the 1st Defendant's case that section 15 of the same Act requires suits for claims in person to be instituted where the Defendant resides or where the cause of action arose. The 1st Defendant states that he resides and works for gain in Mombasa District. He further states that the registered office of the 2nd Defendant is in Mombasa District and that the alleged cause of action arose in the same District.
 17. In view of the above, the 1st Defendant urges this Court to transfer these proceedings to Mombasa Law Courts for hearing and determination.
 18. In response to the above matters as raised by the 1st Defendant in his Replying affidavit, the Plaintiff filed a Further Affidavit sworn on **29th October 2014**. The Plaintiff reiterates the contents of her earlier affidavit to the effect that the present suit arises from and is a follow up to **Nairobi High Court Misc. Civil Application no. 48 of 2011** (*later renumbered as Misc. Civil Application No. 644 of 2012*). The Plaintiff avers that in the said earlier proceedings, the parties recorded a consent order before the Honourable Lady Justice Kalpana Rawal (*as she then was*) on 8th December 2011. In the said consent, the parties agreed that to expedite the resolution of the matter, the same was to be heard by the High Court sitting at Nairobi instead of by way of Arbitration as required by the Company's Article of Association. The Plaintiff also notes that the 1st Defendant and herself are presently engaged in Divorce proceedings, which is part-heard at the Nairobi High Court.

ANALYSIS

19. I have considered the pleadings in this matter as well as the written submissions by Counsel. Having done so, I take the following view of the matter.
20. The main issues for determination are whether the Plaintiff is entitled to the various orders sought for in the Originating Notice of Motion and whether the present suit should be transferred to Mombasa for hearing and determination.
21. It is not in dispute that the 2nd Defendant Company is in existence and that the Plaintiff and the 1st Defendant are the only two shareholders and directors of the Company each holding 50% of the shares.
22. The Plaintiff's case is that the 1st Defendant has excluded her from the running of the Company's affairs. It is therefore the Plaintiff's contention that she is unaware of the state of the operations of the Company including the income and profits received over the years. On the 1st Defendant's side, the Company has never engaged in business.
23. From the pleadings on record, there is no documentary evidence to show that the Plaintiff has been excluded from running the management and affairs of the company by the 1st Defendant. The 1st Defendant and the Plaintiff are shareholders with equal shares in the company and they each have equal rights with regard to the affairs of the company. In my view, the Plaintiff and the 1st

Defendant are on a level playing field and none of them can really blame the other for curtailing their participation in the running of the company affairs.

24. The Plaintiff argues that she requested for the Company meetings on several occasions but the Defendant ignored such requests and refused to convene a meeting. It is clear that the Plaintiff as a Director should also have taken the initiative to convene such meetings. In the alternative, the Plaintiff had a remedy under Section 131 (2) of the Companies Act following the 1st Defendant's unwillingness to be part of the company meetings. Section 131 (2) of the Companies Act states as follows:-

“If default is made in holding a meeting of the company in accordance with subsection (1), the registrar may, on the application of any member of the company, call or direct the calling of a general meeting of the company and give such ancillary or consequential directions as the registrar thinks expedient, including directions modifying or supplementing, in relation to the calling, holding and conducting of the meeting, the operation of the company's articles; and it is hereby declared that the directions that may be given under this subsection include a direction that one member of the company present in person or by proxy shall be deemed to constitute a meeting.”

From the above provision, it is clear that the Plaintiff had other options other than insisting that the 1st Defendant be the one to convene company meetings. The Plaintiff also had the option of invoking the powers of this Court under section 135 of the Companies Act to call for such meetings.

25. That said, it is a requirement that a Company files annual returns for every year. It is the Defendants' case that a private company cannot transact any business in Kenya with a single director who doubles up as a shareholder. Counsel for the Defendants submitted that due to the Plaintiff's absence from the Country since 2009, the Company was unable to continue with its operations and therefore it did not file its returns as required under **section 125** of the **Companies Act**.
26. It is the 1st Defendant's case that the dormancy on the Company was solely caused by the Plaintiff. It is further the 1st Defendant's case that the Plaintiff managed the company from its incorporation until 2009. There is however no information on the operations of the Company as from 2009 to the time the suit was filed.
27. It is not in dispute that there were no meetings held by the 2nd Defendant Company. In that case the Company was unable to file any statements of accounts or returns as required under the Companies Act. This is the 1st Defendant's position and the Plaintiff has not contested the same. It will therefore be in vain for this Court to give orders compelling the 1st Defendants to give statement of accounts and returns yet it is not clear, from the directors relationship, whether the 2nd Defendant Company was in operation.
28. It is evident that the Plaintiff and the 1st Defendant are in a stalemate whereby none of them wants to give in. Each is blaming the other for failure to manage the affairs of the company. As already stated, there are only two directors who are also shareholders to the 2nd Defendant Company. As it is, the relationship of the Plaintiff and the 1st Defendant has already deteriorated and therefore the issue of objectivity with regard to the status of the Company is in question. The two already have conflicting positions as to the status of the Company. The Plaintiff on the one hand seems to be convinced that the company is in business and that the 1st Defendant is running the same in secrecy. On the other hand the 1st Defendant is categorical that the company has not been engaged in business. Both parties have stuck to their guns.
29. That notwithstanding, it is my view that the Plaintiff did not present sufficient evidence before this Court to show that she was excluded from participating in the affairs of the Company. In fact, some of the allegations raised by the Plaintiff against the 1st Defendant are criminal in nature and should be treated as such. If the Plaintiff is convinced that the 1st Defendant is secretly doing business under the 2nd Defendant Company and that he has closed or changed the Joint Bank accounts they had opened, there should have been a report made to the Criminal Investigations

- Department. Perhaps, the investigations would have shed some light on the Plaintiff's claims.
30. I would have given an order for an audit to be undertaken but the same may end up just being an order in paper. It has already been established above that the company has not filed any annual returns since its inception. In that case there will be no statement of accounts or returns to be audited. In addition the filing of the returns was the responsibility of both directors and not the 1st Defendant alone.
 31. It is also the Plaintiff's case that together with the Defendant, they opened a Bank account at the Kenya Commercial Bank, Mtwapa. The Plaintiff's contention is that the 1st Defendant has locked her out from accessing the said Bank account despite the fact that she is a co-signatory thereto. The Plaintiff alleges that the 1st Defendant appears to have since changed or closed the account. The 1st Defendant did not expressly deny the fact that there was an account. His contention is that the Plaintiff's allegation that he has denied her access is misleading because signatories of a Bank account cannot be denied access by the Bank unless such a person ceases to be a signatory.
 32. In a letter dated 29th March 2011, the Plaintiff's Advocates wrote to Kenya Commercial Bank, Mtwapa requesting them to supply the Plaintiff with all statements of Account with regard to Account No. 1108976360. The Bank replied on 2nd April 2011, indicating that the account details provided by the Plaintiff (Account Number 1108976260) did not tally with their records. It is not clear what further action the Plaintiff's Advocates took after this response.
 33. In her further Replying affidavit, the Plaintiff attached a Bank slip dated **5th March 2008** as proof of the existence of a Bank account with KCB Mtwapa. The slip indicates the account name as Ashari Apartments Limited and the Account Number as 080214500110. This is obviously different from Account No. 1108976260 in which the Plaintiff had sought records from the Bank. It is therefore not clear which Bank account the Plaintiff has been restrained from accessing. There is no evidence to show that the Bank or the 1st Defendant has denied the Plaintiff access to any Bank account.
 34. All the same, the issue of signatories and access to whichever Bank account can only be adequately addressed by the Bank at this point. It is for the Plaintiff to approach the Bank equipped with the full details of the Bank Accounts she is questioning or any financial activities of the 2nd Defendant Company.
 35. I will now turn to the issue of whether the current suit should be transferred to Mombasa for the hearing and determination. The 1st Defendant avers that the matter should be heard in Mombasa because he resides and works there and that the registered office of the 2nd Defendant is in Mombasa. He further avers that the cause of action arose in Mombasa.
 36. In opposing the application for transfer, it is the Plaintiff's case that the parties recorded a consent order before the Honourable Lady Justice Kalpana Rawal (*as she then was*) on 8th December 2011. In the said consent, the parties agreed that to expedite the resolution of the matter, the same was to be heard by the High Court sitting at Nairobi instead of by way of Arbitration as required by the Company's Article of Association. In my view, the import of this ruling was not to restrict the hearing of this matter to the High Court of Nairobi. The ruling simply determined that the matter would be heard in Court and not by way of arbitration.
 37. The position in law as regards place of filing suits is clear as provided for under Sections 12, 13 and 15 of the Civil Procedure Act. Sections 12 & 13 of the Civil Procedure Act require suits to be instituted where the subject matter is situated. Further, section 15 of the same Act requires that suits should be filed where the Defendant resides or where the cause of action arose.
 38. However, I will not belabour on the issue of whether or not to transfer this suit. Given that I have already determined the current application, the same is overtaken by events. It should however be clear that the appropriate place to file any other suit or application in relation to the 2nd Defendant Company is the Mombasa High Court or any other High Court within that jurisdiction.
 39. In the upshot, the Plaintiff's Originating Notice of Motion dated **6th June 2014** and filed in Court on **11th July 2014** is hereby dismissed with no order as to costs.

Orders accordingly.

READ, DELIVERED AND DATED AT NAIROBI THIS 27TH DAY OF FEBRUARY 2015

E. K. O. OGOLA

JUDGE

PRESENT:

Wananda for the Plaintiffs

No appearance for the Defendant

Teresia – Court Clerk