



Kamau v Performers Rights of Kenya (Commercial Miscellaneous Application E868 of 2022) [2024] KEHC 2281 (KLR) (Commercial and Tax) (5 March 2024) (Ruling)

Neutral citation: [2024] KEHC 2281 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX**

COMMERCIAL MISCELLANEOUS APPLICATION E868 OF 2022

JWW MONG'ARE, J

MARCH 5, 2024

IN THE MATTER OF: 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) OF THE COMPANIES ACT, NO.17 OF 2015**

AND

**IN THE MATTER OF AN APPLICATION FOR
PROTECTION AGAINST OPPRESSIVE CONDUCT.**

BETWEEN

VALENTINE WANJIRU KAMAU APPLICANT

AND

PERFORMERS RIGHTS OF KENYA RESPONDENT

RULING

1. For determination is a Notice of Motion Application dated 5/12/2022 brought under Article 27(1) (2), 36(1), 47 (1) (2) of the constitution of Kenya 2010 and section 780(1), 782(1), 782(2), 782(2)(c) of the Companies Act.
2. The Applicant seeks the following orders:-
 - “1. Spent.
 2. Spent.



3. That this court be pleased to order that the names of the Applicant be included in the list of nominees approved for election of the Board members of the Respondent.
4. That a special general meeting is called within 30 days from the date of this order for the purpose of election of the new members to the Board of directors of the Respondent.
5. That in the alternative this court regulates the affairs of the Respondent to the extent that an order be issued that a fresh 7(seven) member vetting committee be formed that includes, this courts registrar, one former Non-Candidate director, the Company secretary, a member from the regulator-Kenya Copyright Board and 4(four) members of the Applicant to vet candidates for the director's position and oversee the process of election of directors.
6. That a fresh 14 days' Notice of Prisk Board elections from the date of this order be issued and at the lapse of the notice, a Special General Meeting be called within 30 days from the date of lapse of notice where the election of the Board Members shall be conducted via secret ballot and overseen by the 7(seven) member committee.
7. Any other order the court may deem appropriate.
8. That cost of this application be provided."

3. The application is based on the grounds stated in its body and the supporting affidavit of the Applicant.
4. The grounds are that the Respondent is a Company whose affairs are run by members through resolution as per the Memorandum of Association and Companies Act and the Applicant is a member of more than 5 years.
5. The Applicant averred that the Respondent through its Company Secretary issued a notice of PRISK Board elections dated 16/11/2022 and that she filed her documents for election as a Board Member representative for actor/musicians which was received by the Respondent on 30/11/2022.
6. The Applicant was aggrieved as the vetting committee issued a list of nominees but she was not included in the list despite meeting all the terms and conditions in the notice. That further, on the position of Board Member representative for actor/musician, the said vetting committee approved only one candidate meaning they had been elected to the Board unopposed.
7. It was the Applicant's case that she has a right to participate and to be elected in an election to the Board, which right is protected under Article 27(1) (2) of the constitution and Article 35 of the Memorandum and Articles of Association of the Company.
8. The Applicant pleaded that unless this court acts with urgency and gives the orders sought, the Applicant is likely to suffer irreparable harm.
9. In opposition the Respondent filed a replying affidavit sworn on 30/1/2023 by Joseph Njagi, its Chief Executive Officer.
10. The deponent averred that the Respondent is a Company limited by guarantee whose affairs on appointment of directors are regulated by the Companies Act 2015, its amended Memorandum and Articles of Association together with its adopted Board Charter and that the present application is



inviting the court to interfere in the management of the affairs of the Company and courts have no jurisdiction to do so unless under extreme and exceptional circumstances.

11. That prayer 3 of the instant application is in the nature of a mandatory injunction as it seeks to have the Respondent compelled to include the name of the Applicant in the list of nominees approved for election and the same cannot be granted in an interlocutory manner unless in the clearest of cases as that would be sacrificing the right of the parties to a fair and proper hearing of their dispute.
12. Further to the foregoing, Mr. Njagi contended that the Applicant failed to present certified academic documents and therefore she did not meet the criteria set out in the Company's Memorandum and Articles of Association and its Board charter. That the vetting committee considered the fact that the Applicant was previously a director of the Respondent but was removed via the Company Resolution of 20/7/2020 for inter alia leaking crucial Company information to 3rd parties.
13. In light of the foregoing, Mr. Njagi averred that the Applicant's disqualification from the nomination to vie for the position of a director in the Company was proper, justified and in accordance with the Company's amended Memorandum and Articles of Association and the Board Charter. That the decision does not warrant interference in the Company's affairs by the court in the manner sought or at all.
14. The Respondent's CEO further contended that Article 35 (b) of the Amended Memorandum and Articles of Association mandate the Board to manage the election process and in this regard that the Board constituted an impartial vetting committee comprising of the Company Secretary, two representatives from the Regulator being Kenya Copyright Board, the concerned Ministry of Youth Affairs, Sports and the Arts, the Respondent's Legal Officer and Human Resource Officer. Therefore, the decision to form the independent vetting committee was well within its mandate under the Memorandum and Articles of Association.
15. Based on the foregoing, the Applicant argued that the application is baseless and prayed to have it dismissed with costs.

Analysis and Determination

16. At the time of writing this judgment, the Plaintiff had filed her written submissions dated 28/7/2023 while the Defendants were not on record.
17. The first issue this court has identified for determination is whether the court has the jurisdiction to determine the matter before it.
18. As stated in the *locus classica* case on jurisdiction of *Owners of the Motor Vessel "Lillian S" V Caltex Oil (Kenya) Ltd* by Justice Nyarangi, "jurisdiction is everything and without it the court or a tribunal must down its tools and take no further steps." This court must in the first instance, determine whether it has the requisite jurisdiction to determine the case before it.
19. On this issue, the Applicant submitted that section 780(1), 782(1), 782(2), 782(2)(c) of the *Companies Act* gave the court the jurisdiction to determine this matter.
20. The Respondent argued that the prayers in the application were an invitation to the court to interfere with the internal management of the Company.



21. In the case of *Mokoosio & another v Vadera & 3 others* (Petition 13 of 2020) [2021] KEHC 56 (KLR) (21 September 2021) the court held:-

“Whereas I agree that disputes regarding internal affairs of a Company ought to be resolved in accordance with the constitution of the Company, where it is alleged that the Company is not acting in accordance with its own constitution, the court has the power to intervene.”

22. Further and in the case of *Seruji Limited v Savannah Cement Limited; Savannah Heights Ltd (Interested Party)* (Miscellaneous Application E445 of 2021) [2021] KEHC 26 (KLR) (Commercial and Tax) (10 September 2021) (Judgement), Mabeya J held:-

“9. .The starting point is to reiterate the holding in the old English case of *Foss v Harbottle* [1843] 2 Hare 261 wherein it was held: -

“... an elementary principle is that a court does not interfere with the internal management of companies acting within their powers”.

10. Closer home, in *Re K Boat Service*, the court held that: -

“Courts will interfere only where the act complained of is ultra vires or is fraudulent character or not rectifiable by ordinary resolution. It is really very important to companies and to the economy of the country in general, that the court should not, unless a very strong case is made out on the facts pleaded and proved or admitted, take upon itself to interfere with the domestic forum which has been established for the management of the affairs of the Company. Accordingly, acts by or on behalf which require the authority of a resolution of the Company and are done without it, or are otherwise irregular, but which can be regularised by the Company at a general meeting and without a special resolution and are neither ultra vires nor of a fraudulent character, are not a ground for a court’s interference upon a winding-up petition, or a petition to remove a director by a minority shareholder ... under the ‘just and equitable’ rule”.

11. It is clear from the foregoing that the jurisdiction of the court to interfere in internal affairs of a Company are limited. This is for good reason. Companies are legal persons that are operated using their constitutive documents. The law, under the *Companies Act*, 2015, carefully set out instances where the court can interfere for the public good and proper running of the economy of the country in general.”

23. Under section 780(1), 782(1), 782(2), 782(2)(c) of the *Companies Act* 2015, the court may give orders that interfere with the conduct of a Company where the Company's affairs are conducted in a manner that is oppressive or prejudicial to the interests of the members generally or to some parts of its members.

24. In this case, the Respondent’s Company secretary issued a notice dated 16/11/2022 indicating that the Respondent’s Board elections would be held on 8/12/2022 in line with its amended constitution. The notice set out the requirements to be met by persons seeking to be elected.

25. The Applicant lodged her application however she was not shortlisted by the vetting committee. In an email dated 7/12/2022, the Applicant was informed that her application did not meet the requirements as per the notice as her academic documents were not certified, member no. P02422 had



nominated another candidate other than her and she had not provided a resignation letter showing cessation of her former directorship.

26. The record shows that the academic documents submitted by the Applicant as received by the Respondent were not certified. Further, the member of the Company that nominated the Applicant for directorship had nominated another Applicant. This is seen under annexures “JN-2” and “JN-3” in the Respondent’s replying affidavit.
27. Further, contrary to the averments of the Applicant, she was duly notified as to why her application was rejected through the email of 7/12/2022, annexed as “JN-4” in the Respondent’s replying affidavit.
28. The Applicant argued that the vetting committee was formed contrary to the *constitution* of the Respondent and questioned its legality. Article 35(b) of the amended Memorandum and Articles of Association mandate the Board to manage the election process and in this regard, the Board constituted the vetting committee which comprised of the Company Secretary, two representatives from Kenya Copyright Board, the concerned Ministry of Youth Affairs, Sports and the Arts, the Respondents legal officer and human resource office. I therefore find no illegality in the manner in which the vetting committee was formed.
29. I note further that the Applicant was previously a director of the Respondent but was removed through a Company Resolution of 20/7/2020 for inter alia leaking crucial Company information to 3rd parties, a factor that was considered by the vetting committee.
30. Based on the foregoing, the court does not find that the actions of the Respondent in carrying out the elections of members of the Board was ultra vires the Memorandum and Articles of Association of the Company nor that they were of a fraudulent character to warrant interference by the court. The actions of the Company have also not been proved to be oppressive or prejudicial to the interests of the Applicant as stipulated under section 780 of the *Companies Act*.
31. I find that there is, therefore, no need for the court to intervene in the internal affairs of the Respondent. Subsequently, the Application filed herein is dismissed for lack of merit with costs awarded to the Respondent.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 5TH DAY OF MARCH, 2024.

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J.W.W. MONG'ARE

JUDGE

In the Presence of:-

1. Mr. Owade for the Applicant.
2. Mr. Mburu for the Respondent.
3. Amos - Court Assistant

