



REPUBLIC OF KENYA



KENYA LAW

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**Kamau v Njenga (Commercial Petition E013 of 2022)
[2024] KEHC 4746 (KLR) (Commercial and Tax) (12 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 4746 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL PETITION E013 OF 2022**

MN MWANGI, J

APRIL 12, 2024

BETWEEN

JOYCE WANJIRU KAMAU PETITIONER

AND

ALLEN KARANJA NJENGA RESPONDENT

RULING

1. The petitioner filed a petition accompanied by a Notice of Motion application dated 30th August, 2023, pursuant to the provisions of Sections 780, 782, 786 & 789 of the Companies Act, 2015, Order 40 Rule 1 of the Civil Procedure Rules, and Sections 1A, 1B, 3 & 3A of the Civil Procedure Act seeking the following orders -
 - i. Spent;
 - ii. That pending the hearing and determination of this application and the petition, an injunction do issue restraining the respondent, their (sic) servants, agents. and/or employees from selling, alienating, transferring, charging, disposing, removing, or in any way manner whatsoever dealing with the assets of the company;
 - iii. That pending the hearing and determination of the petition, the respondent be compelled to produce the books of records, and bank statements of the company in his custody from 2020 up to date;
 - iv. That pending the hearing and determination of this application and the petition, all rental proceeds of the block of flats erected on Ngong/Ngong/11379 together with the income generated from the trucks registered in the company's name be deposited into the company's designated bank account No. 0730278665175; and



- v. That costs of this application be provided for.
2. The application is premised on the grounds on the face of the Motion and is supported by affidavits sworn on 30th August, 2023 and 21st September, 2023 by Joyce Wanjiru Kamau, the petitioner herein. In opposition thereto, the respondent filed a replying affidavit sworn on 12th September, 2023, by Allen Karanja the respondent herein, and a Notice of Preliminary Objection dated 12th September, 2023 raising the following grounds -
 - i. The Petitioner has no requisite locus standi to institute this suit for lack of judicial approval by dint of Section 238 of the [Companies Act](#), 2015 and should therefore be struck out with costs (sic);
 - ii. The suit is defective having been instituted against the respondent in his (sic) personal capacity contrary to Section 3 of the [Companies Act](#), 2015 and without lifting the corporate veil;
 - iii. The pleaded cause of action is against the director and the orders sought cannot issue as it will totally prejudice the respondent who has irregularly been sued before the Court on the basis of innuendos and rumours;
 - iv. The petitioner seeks to pursue a personal vendetta in the guise of a cause of action vested and/or seeking relief on behalf of the company without obtaining leave of the Court as required by law; and
 - v. The Honourable Court has no jurisdiction to hear and determine this matter by dint of Sections 3 and 238 of the [Companies Act](#), 2015 and based on the cause of action as pleaded.
 3. The application herein and the Notice of Preliminary Objection were canvassed by way of written submissions which were highlighted on 12th February, 2024. The petitioner's submissions were filed on 22nd September, 2023 by the law firm of Jane Gachuiga & Associates Advocates, whereas the respondent's submissions were filed by the law firm of Katunga Mbuvi & Company Advocates on 16th October, 2023.
 4. Ms. Okulo, learned Counsel for the petitioner submitted that contrary to the respondent's belief, this petition has been filed pursuant to the provisions of Sections 780 & 782 of the [Companies Act](#) which provide for protection of members against oppressive conduct and unfair prejudice, and do not require a party to seek leave of Court before filing the suit. She relied on the case of *In re Al Marshidy Enterprises Limited* [2019] eKLR and asserted that the petition is properly before this Court.
 5. Counsel referred to the provisions of Section 780(2) of the [Companies Act](#) and the case of *Qi Zhen Cai v Qinwen He, Xiao Hong Yu & another* [2017] eKLR and submitted that since the petitioner is a member of the company in question by virtue of being a 50% shareholder and a director of the company, she has the requisite locus standi to sue the respondent.
 6. Ms. Okulo cited the case of *Velani & 6 others v Naran & 2 others*, Petition E002 of 2020 where the Court defined what amounts to oppressive conduct and argued that the petitioner in paragraph 16 of her supplementary affidavit has stated instances of what she considers to be oppressive conduct against her by the respondent. Counsel cited the case of *NGV v CNV also known as CHM (Matrimonial Cause 6 of 2021)* [2022] KEHC 16645 (KLR) and asserted that the respondent's contention that she must demonstrate her contribution to the company is flawed and misinformed in this matter since this Court cannot be called upon to determine the extent of each party's contribution to distribute assets as would be the case in matrimonial disputes. In addition, the parties herein have equal shareholding



- in the company, thus any division or distribution of its assets should be governed by the [Companies Act, 2015](#).
7. Mr. Katunga, learned Counsel for the respondent submitted that the company in question was registered on 19th June, 2013 with the parties herein as directors owning equal shares, which means that the petitioner herein does not qualify as a member under Section 780(2) of the [Companies Act, 2015](#) to rely on the provisions of Section 780 of the [Companies Act](#). He further submitted that the petitioner has filed this application in her capacity as a director as can be seen in paragraphs 2 & 3 of the petitioner's supporting affidavit sworn on 30th August, 2023, but Section 780 is not applicable to directors.
 8. It was stated by Counsel that at paragraph 11 of the petitioner's supporting affidavit, she deposed that she has brought the application herein in good faith to protect the company from financial harm caused by the respondent. Mr. Katunga stated that it is clear that the petition herein has been filed by the petitioner for and on behalf of the company, hence the only applicable avenue to her under the law is Section 238 of the [Companies Act](#).
 9. Counsel further stated that the petitioner has made allegations that the respondent is diverting the company's income generated from rental flats, company's machinery and commercial trucks and proceeds, to accuse the co-director of gross breach of his fiduciary duty as a director of the company which grievances can be ventilated under Section 238(3) of the [Companies Act, 2015](#). He relied on the case of Nairobi Commercial and Tax Administration Civil Case No. E286 of 2019: Harjinder Singh Rihal v Jaswinder Singh Rihal and asserted that for a claim under Section 238 of the [Companies Act, 2015](#), one must first seek leave of Court before instituting the said claim which has not been done by the petitioner herein.
 10. Mr. Katunga relied on the case of Nairobi High Court Commercial and Tax Division Petition No. E003 of 2019: Njamba Wambugu v Winfreda Wanjiku Ngumi & Space Style Limited and submitted that this Court is being called upon to ascertain whether the reliefs sought herein are made for the good of the company independent of the marital affair that existed between the parties herein. He urged this Court to be cautious and take the interests of the company at heart. He submitted that the petitioner having confirmed that she has never been involved in the running and management of the company, cannot plead oppressive conduct. He stated that the petitioner has never received any remuneration from the company, and that the sum of Kshs. 129,500/= received by the petitioner on a monthly basis is meant to take care of their children's upkeep in compliance with a parental responsibility agreement entered into by the parties herein.
 11. Counsel asserted that it is the respondent who applied for a financial facility of Kshs. 20,000,000/= from Equity Bank Limited for construction of up to the 2nd floor of a five storey rental building on property Title No. Ngong/Ngong/11379, which facility was secured by a first charge on the rent and guaranteed by Calikam Company Limited, and that is the reason why no rent goes into the company's account. He stated that the company does not own the property known as Ngong/Ngong/11379 and that is the reason why the rent collected from the said property is not deposited into the company's account. Counsel further stated that the said rent is used to service the aforementioned loan and to take care of other maintenance expenditure such as caretaker salary, rental tax, electricity, security, sewer exhauster, and insurance, thus the petitioner's contention that there is a balance of Kshs.300,000/= unaccounted for has no merits.
 12. Mr. Katunga cited the case of Meru High Court Miscellaneous Application No. 112 of 2019: Thilange Munjuri Acquilino v Baimuru Investments Limited & 3 others and submitted that the issues raised by the applicant can be addressed during a general meeting and avoid the cost of litigation involved.



He referred to the case of *Giella v Cassman Brown* [1973] EA 358 and submitted that the petitioner has not demonstrated and/or established any of the conditions precedent to the grant of an order of interlocutory injunction. He contended that all that the petitioner has presented to this Court are unproved allegations which show that the instant application and the petition have been made out of bitterness of the parties' divorce. Counsel relied on the case of *Harjinder Singh Rihal v Jaswinder Singh Rihal* (supra) and urged this Court not to be dragged into the personal issues on the directors of the company.

Analysis and Determination.

13. I have considered the instant application, the grounds on the face of it and the affidavits filed in support. I have also considered the replying affidavit and Notice of Preliminary Objection filed by the respondent, alongside the written submissions filed by Counsel for the parties. The issues that arise for determination from the application and the Notice of Preliminary Objection are-
 - i. Whether the petitioner ought to have sought leave of the Court before filing the application and the petition herein;
 - ii. Whether the petitioner had the requisite locus standi to file the instant application and petition;
 - iii. Whether an order of temporary injunction should issue;
 - iv. Whether the respondent should be compelled to produce the company's books of records and account statements in his custody from the year 2020 to date; and
 - v. Whether the rental proceeds of the block of flats erected on Ngong/Ngong/11379 together with the income generated from the trucks registered in the company's name should be deposited into the company's designated bank account.
14. The petitioner in her affidavit in support of the instant application deposed that the respondent is her co-director and an equal shareholder at Calikam Company Limited which was incorporated on 19th June, 2013 with a nominal share capital of Kshs.100,000 divided into 1,000 ordinary shares of Kshs.100 each. She averred that the said company is the registered proprietor of all that property known as Ngong/Ngong/11379, which comprises a block of rental flats erected thereon. That the said company also owns construction and other machinery as well as trucks registration Nos. KCL 191Y, KCK 867T and KAJ 141 U-Grader.
15. It was stated by the petitioner that the company's income is generated primarily from rental income, and leasing of machinery and trucks. She also stated that the respondent and her were once married but has since divorced, and since moving out of their matrimonial home in July 2021, the respondent who was running and managing the affairs of the company stopped apprising her of the affairs of the company and has solely taken over the management of the finances and operations of the said company, thus disenfranchising her of her rights as a director and equal shareholder in the company.
16. She contended that the respondent has diverted the company's income generated from the rental flats on L.R. No. Ngong/Ngong/11379 by directing the tenants thereon to pay rent to his own personal Account No. 0660195949385 as opposed to the company's designated Account No. 0730278665175 where they are both signatories. She claimed that the respondent has also diverted proceeds of income from the company's machinery and commercial trucks which have been leased out. She averred that these actions constitute a gross breach of the respondent's fiduciary duty as a director of the company. The petitioner averred that her attempts to address the above issues with the respondent have borne no fruits thus necessitating this suit to protect her interests and that of the company.



17. The respondent in his replying affidavit deposed that the instant application has wild imaginations actuated by damaged emotions as a result of the recently concluded divorce case. He averred that the petitioner does not have the requisite locus standi to institute this suit having not applied for the leave of Court prior to filing the petition and the application herein. In addition, that this suit is defective having been instituted by the petitioner in her personal capacity contrary to Section 3 of the *Companies Act*, 2015.
18. The respondent contended that granting the orders sought herein will be prejudicial to him since the respondent has not lifted the corporate veil so as to bring the suit against him herein, in his personal capacity. He asserted that the issues raised by the petitioner could be addressed in a general meeting. He referred to paragraph 8 of the petitioner's affidavit in support of the application herein and stated that the applicant should have approached the Court in accordance to the provisions under Section 238 of the *Companies Act*, 2015.
19. The respondent averred that the trucks in question were solely purchased by him but registered under the company's name. He further averred that there is no evidence of the alleged diverted funds and no tenant has sworn any affidavit confirming the said allegation. In addition, that no accounts have been tendered before this Court to show how much the respondent has allegedly pocketed as claimed by the petitioner.
20. In a rejoinder, the petitioner filed a supplementary affidavit where she averred that the instant application has been brought under Part XXIX and not under Section 238 (Part XI) of the *Companies Act* No. 17 of 2015. She further averred that it is the respondent's actions in his individual capacity and not as a representative of the company that constitute oppressive conduct against her, and as such, the respondent has been properly sued and no leave is required to lift the corporate veil.
21. The petitioner contended that in view of the circumstances of this case, the prospect of having a general meeting attended by the parties herein is highly unlikely, thus the situation calls for this Court's orders. She asserted that during the parties' marriage, she had no problem having the respondent oversee and manage the company's affairs since he remained accountable to her as a shareholder and director. Further, that she remained actively involved in the operation of the company in offering policy and professional steering as a professional Accountant.
22. She stated that she was also involved in securing the Equity Bank facility that placed the company as a corporate guarantor, a decision that required both directors to execute a resolution before the facility could be approved. She deposed that following their separation and divorce, substantial changes in their circumstances have necessitated her active involvement in the management of the company to safeguard her stake as a shareholder, but the respondent has chosen to exclude her from the flow of information and updates related to the company and its finances.
23. The petitioner further stated that she had been receiving the company's bank account statements during and after their marriage as well as considerable remuneration from the company's finances but that stopped in April 2022. She deposed that her involvement in other businesses does not negate her right to actively participate in and manage the company's affairs as a director and shareholder.
24. The petitioner averred that the financial facility from Equity Bank was to finance the construction of 2 out of 5 floors of the multi-story building located on the company's property LR No. Ngong/ Ngong/ 11379, and as such, the rental income available for the loan repayment purposes is confined solely to the proceeds generated from the 2 floors of the building. She contended that the income from the 3 other floors remains unaccounted for, and that the total monthly rental income from the said apartments is approximately Kshs.600,000/=. She indicated that Kshs.315,072.00 out of the said total



income is secured to Equity Bank to service the loan until February 2028, but the balance thereof is still not accounted for by the respondent.

25. The petitioner averred that the parties had an arrangement that saw the entire rental income from the apartments erected on all that parcel of land known as Ngong/Ngong/11379 deposited into the respondent's personal bank account, and once the monthly loan repayment of Kshs.315,072l.00 was made to the bank, the remainder would be transferred to the company's bank account. She stated that on scrutinizing the company's bank account statement, she observed a recurring pattern of debits by the respondent in amounts ranging from Kshs.200,000/= to Kshs.210,000/=, which correspond closely to the anticipated surplus rental income.
26. Before I delve into the determination of the earlier identified issues, I will deal with the issue of lifting of the corporate veil. The respondent contended that granting the orders sought herein will be prejudicial to him since the corporate veil has not yet been lifted. The application herein has been brought pursuant to the provisions of Sections 780 & 782 of the *Companies Act* which provide for protection of members against oppressive conduct and unfair prejudice. Section 782(4) states that –

“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.”
27. In light of the above provisions, I am of the considered view that a suit brought under the provisions of Sections 780 & 782 of the *Companies Act* are ordinarily against directors in their personal capacity. The company is only entitled to be served with a copy of the application, appear and be heard as a respondent, if it so wishes.
28. For this reason, lifting of the corporate veil before issuing the orders sought by the petitioner in this case is not necessary. In any event, other than alleging that he will suffer prejudice, the respondent has not demonstrated what prejudice he will suffer and to what extent, if the orders sought are granted without the Court first lifting the corporate veil.

Whether the petitioner ought to have sought leave of the Court before filing the application and the petition herein.

29. The respondent contended that the petitioner has filed this petition for and on behalf of the company, since she has made allegations that the respondent is diverting the company's income generated from rental flats, company's machinery and commercial trucks, which acts amount to a gross breach of his fiduciary duty as a director of the company. The respondent argued that for the said reason, the only applicable avenue to her under the law is Section 238 of the *Companies Act*. The respondent submitted that in view of the foregoing, the petitioner ought to have first sought leave of the Court before filing the petition and application herein.
30. The petitioner on the other hand submitted that the application and petition herein have been filed pursuant to the to the provisions of Sections 780 & 782 of the *Companies Act* which provide for protection of members against oppressive conduct and unfair prejudice, and do not require a party to seek leave of the Court before filing of a suit of this nature.
31. On perusal of the instant application, it is evident that it has been filed pursuant to the provisions of Sections 780 & 782 of the *Companies Act* which states as hereunder –

“780. Application to Court by company member for order under section 796



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-

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have been transferred; or

- b. have been transmitted by operation of law.

782. Power of Court to make orders for protection of members against oppressive conduct and unfair prejudice

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.”
32. It is worth noting that proceedings under Sections 780 & 782 of the *Companies Act* do not require leave of the Court before being instituted unlike those under Section 238 of the *Companies Act* which provide for derivative suits. In this case, the petitioner's complaints are centered around being locked out of the running and management of the company, the respondent diverting company funds into his personal account and using the said funds for his personal use, thus disenfranchising her of her rights as a director and an equal shareholder in the company. These complaints are in line with the provisions of Section 780 (1) (a) of the *Companies Act*, 2015. The petitioner filed this petition under Sections 780 & 782 of the *Companies Act* so as to protect herself as a member of the company against oppressive conduct and unfair prejudice.
33. The provisions of Part XI of the *Companies Act* which provides for derivative suits are available to minority shareholders. The petitioner and the respondent herein are the only shareholders of the company in question, and they are equal shareholders. For this reason, the petitioner cannot even purport to institute a derivative claim as against the respondent since the provisions of Part XI of the *Companies Act*, 2015 are not available to her.
34. In view of the above, I agree with Counsel for the petitioner that the dispute between the parties herein is not a derivative claim, thus the petitioner was not required to seek leave of the Court prior to filing the instant petition and application.

Whether the petitioner had the requisite locus standi to file the instant application and petition.

35. The respondent averred that the petitioner does not have the requisite locus standi to file the petition and application herein as she does not fit in the description of a “member” as provided under Section 780(2) of the *Companies Act* which states that a “member” includes a person who is not a “member” of the company but is a person to whom shares of the company have been transferred or have been transmitted by operation of the law. It was argued that the shares the petitioner holds in the company were not transferred to her or transmitted to her by operation of the law, as she acquired them when the parties herein registered the company on 19th June, 2013 as equal shareholders and directors.
36. The phrase locus standi was defined by the Court of Appeal in the case of *Njau & others v City Council of Nairobi*, KLR [1983] 625 as hereunder –
- “Locus Standi literally means a place of standing and refers to the right to appear or be heard in Court or other proceedings and to say that a person has no locus means that he has no right to appear or be heard in such and such proceedings”.
37. It is evident from Section 780(2) of the *Companies Act*, 2015, that it is only a “member” of the company and the Attorney General who can apply for protection against oppressive conduct and unfair prejudice to protect the interests of members of a company. According to the said provisions, 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 the law. There are several ways in which an



individual can acquire the status of a “member” of a company. The said ways have been listed in Section 92 of the [Companies Act](#), 2015, which states as hereunder -

- “(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.”

38. It is not disputed that the company in question was registered by both the petitioner and the respondent as equal shareholders and co-directors. For this reason and in line with the provisions of Section 92(1) of the [Companies Act](#), the petitioner is a “member” of the company in question. Section 780(2) of the [Companies Act](#), 2015, does not limit the definition of a “member” for purposes of Section 780 of the said Act only to persons whose shares in a company have been transferred or have been transmitted by operation of the law. To the contrary, Section 92 of the [Companies Act](#), 2015, extends the definition of a “member” to accommodate persons who are not “members” within the meaning of Section 780(2) of the said Act.

39. From the above reasoning, I am persuaded that the petitioner is a member within the meaning of Section 92(1) as read with Section 780(2) of the [Companies Act](#), 2015. She therefore had the requisite locus standi to file the instant application and petition.

Whether an order for temporary injunction should issue.

40. Temporary injunctions are provided for under Order 40 Rule 1 of the Civil Procedure Rules, 2010 which states that –

“Where in any suit it is proved by affidavit or otherwise-

- a. that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or
- b. that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.”

41. The test for granting of an interlocutory injunction was considered in the case of *American Cyanamid Co. v Ethicom Limited* [1975] A AER 504, where three elements were noted to be of great importance, namely:

- “(i) There must be a serious/fair issue to be tried;
- (ii) Damages are not an adequate remedy, and



iii. The balance of convenience lies in favour of granting or refusing the application.”

42. The Court of Appeal in the case of *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* [2003] eKLR, considered what constitutes a prima case and stated as follows-

“So what is a prima facie case” I would say that in civil cases it is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the Applicant’s case upon trial. That is clearly a standard, which is higher than an arguable case.”

43. The petitioner’s case is that Calikam Company Limited is the legal and registered owner of all that property known as Ngong/Ngong/11379, which comprises a block of rental flats erected thereon. The company also owns construction and other machinery as well as trucks registration Nos. KCL 191Y, KCK 867T, and KAJ 141 U-Grader which the company leases out from time to time. The petitioner contended that the company’s income is mainly generated from rental income and proceeds as a result of leasing machinery and the aforementioned motor vehicles. She averred that at the time Calikam Company Limited was incorporated and registered, the parties herein were married and living as husband and wife. That during that time and until sometime in July 2021, the respondent was running and managing the day to day affairs of the company and would regularly apprise her of the affairs of the company.

44. She contended that the parties herein have since divorced and since the respondent moved out of their matrimonial home in July 2021, he stopped apprising her of the affairs of the company, and took over the sole management of the finances and operations of the company to the exclusion of the petitioner, thus disenfranchising her of her rights as a director and equal shareholder in the company. The petitioner averred that the respondent has since diverted the company’s income generated from the rental flats on L.R. No. Ngong/Ngong/11379 by directing the tenants thereon to pay rent to his own personal Account No. 0660195949385 as opposed to the company’s designated Account No. 0730278665175 where they are both signatories. She stated that he has also diverted proceeds of income from the company’s machinery and commercial trucks which have been leased out.

45. The respondent in opposition to the instant application stated that the trucks in question were solely purchased by him but registered under the company’s name, and there is no evidence of the alleged diversion of funds. He averred that the petitioner is a dormant director, and having confirmed that she has never been involved in the running and management of the company, she cannot plead oppressive conduct. He further averred that the company does not own the property known as Ngong/Ngong/11379 and that is why rent collected from the said property is not deposited into the company’s account. In addition, he stated that the rent is used to service the loan and take care of other maintenance expenditure such as the Caretaker’s salary, rental tax, electricity, security, sewer exhauster, and insurance, thus the petitioner’s contention that there is a balance of Kshs.300,000/= unaccounted for has no merit.

46. In as much as the respondent claims the aforementioned properties do not belong to Calikam Company Limited, he has not tendered any evidence to show that the said properties belong to him and/or some other person or entity. From the foregoing, and the pleadings filed by the parties herein, it is clear that all that property known as Ngong/Ngong/11379, which comprises a block of rental



flats erected thereon, together with trucks registration Nos. KCL 191Y, KCK 867T, and KAJ 141 U-Grader belong to Calikam Company Limited as asserted by the petitioner

47. The allegation that the petitioner was a dormant shareholder who did not participate in the day to day running of the company's affairs thus she cannot claim oppressive conduct are neither here nor there. In view of the fact that it is not disputed that the petitioner and the respondent are not only equal shareholders of Calikam Company Limited but are also co-directors in the said company, the respondent had the duty, and still has the duty to apprise the petitioner of the day to day running of the company's affairs, and run the company in a way that is beneficial not only to the company, but to the shareholders of the company as well.
48. The respondent did not dispute the fact that he does not apprise the petitioner of the affairs of the company, and that he has locked her out of the management of the said company. This means that the petitioner has no way of ascertaining whether or not the respondent is running Calikam Company Limited in a way that is beneficial to the company and its shareholders. The respondent confirmed that the rental income derived from the property erected on all that parcel of land known as Ngong/Ngong/11379 is deposited into his personal account and thereafter, part of it is deducted to take care of the monthly loan repayment instalments to Equity Bank and the remainder is used to take care of other maintenance expenditure such as the Caretaker's salary, rental tax, electricity, security, sewer exhauster, and insurance.
49. The respondent did not provide any documentation such as invoices, receipts, and payment acknowledgment receipts to prove the aforesaid maintenance costs. This Court is therefore left to wonder how the balance of the rental income is applied by the respondent. The petitioner's claim is based on oppressive conduct by the respondent in the manner in which he has been running the affairs of Calikam Company Limited, which company the petitioner is a shareholder and a co-director, thus causing her unfair prejudice. The Court in the case of *Velani & 6 others v Naran & 2 others* (Petition E002 of 2020) [2021] KEHC 75 (KLR) in defining what amounts to oppressive conduct stated thus –

“Oppression has been characterized as conduct which is burdensome, harsh and wrongful, or which lacks of probity and fair dealing. The reference to conduct that is “oppressive” or “unfairly prejudicial to the interests of the members generally or of some part of its members” in section 780 (1) (a) makes it clear that conduct affecting all members of a company equally may be unfairly prejudicial. There is no need for a petitioner to establish that he has been treated differently to other shareholders (albeit that this is a factor likely to strengthen his claim of unfair prejudice).

Conduct which is “oppressive” or “unfairly prejudicial” must be shown for relief to be granted (although there is no need to show discrimination as well as unfair prejudice). The conduct complained of should at the lowest involve a visible departure from the standards of fair dealing, and a violation of the conditions of fair play on which every shareholder who entrusts his money to a company is entitled to rely.

There are two elements to the requirement of unfair prejudice, and both must be present to succeed in a claim: (a) the conduct must be prejudicial in the sense of causing prejudice or harm to the relevant interest of the members or some part of the members of the company (i.e. shareholders), and, (b) it must be unfair.

The test as to what amounts to unfair prejudice is objective. It is not necessary for the petitioning shareholder to show that anybody acted in bad faith or with the intention of causing prejudice. The courts will regard the prejudice as unfair if a hypothetical reasonable bystander would believe it to be unfair.



...

The conduct must be unfairly prejudicial to the Petitioner's interests in his capacity as a member of the Company (i.e. as a shareholder), but the court takes a broad view of what might be regarded as his interests as a member of the Company. The words "oppressive" or "unfairly" enables the court to consider wider equitable considerations and recognizes that the members have rights and expectations which are not necessarily included in the Articles of Association. For example, a member's interest may arise out of an agreement that some or all members should participate in the management of the Company. A member's interest is not, therefore, limited to his strict legal rights, but can extend to legitimate expectations arising from the nature of the Company and agreements and understandings between the parties."

50. In light of the above authority and analysis that I have made in this application, I am persuaded that the petitioner has successfully demonstrated that the manner in which the respondent is running the affairs of Calikam Company Limited amounts to oppressive conduct to her, thus causing her unfair prejudice. As an equal shareholder and a co-director of the company, the petitioner has the right to be apprised of the day to day running of the company, participate in decision making in its affairs and its properties, benefit and/or receive profits, dividends or some form of beneficial interest from the proceeds generated by the company, which is not the case herein. It is noted that the respondent wants to solely run and manage Calikam Company Limited, and claim ownership of the properties registered in the name of the company, to the exclusion of the petitioner thus denying her the chance to realize the profits and/or benefits or dividends arising from her investment in the company.
51. Courts have often held that they will not interfere with the internal affairs or management of companies. This position was taken by the Court in the case of *Foss v Harbottle* [1843] 2 Hare 261, wherein it was stated that Courts will interfere only where the act complained of is ultra vires, or is fraudulent or not rectifiable by an ordinary resolution. I am of the considered view that the acts complained of by the petitioner are not only ultra vires, but are also fraudulent. Further, the complaints raised by the petitioner cannot be resolved in a general meeting since the meeting will be attended by the parties herein who are equal shareholders, thus the possibility of not reaching a consensus on the said issues is high. In the premise, I am persuaded that the petitioner has established a prima facie case against the respondent with high chances of success.
52. On whether the petitioner stands to suffer irreparable damage that cannot be compensated by an award of damages in the event the orders sought herein are not granted, I am of the considered view that is the case since the respondent shall continue to run the affairs of the company and manage its properties to the exclusion of the petitioner, and for his sole benefit. In addition, there is no way of ascertaining what will be left of Calikam Company Limited by the time the petition herein is heard and determined, and whether the petitioner's investment will be secure or not. In view of the above, the balance of convenience tilts in favour of the petitioner.

Whether the respondent should be compelled to produce the company's books of records and bank statements in his custody from the year 2020 to date.

53. The respondent confirmed that he has been running the affairs of Calikam Company Limited and its properties solely to the exclusion of the petitioner and for his own benefit. In the said circumstances, it is my considered view that it is not only fair but in the interest of justice for him to be compelled to produce the company's books of records and account statements in his custody from the year 2020 to date, so as to bring the petitioner and the Court up to speed with the current state of affairs of



the company, and for the Court to be able to aptly determine the dispute between the parties herein. Production of the company's books of records and bank statements shall be done within 60 days of this ruling.

Whether the rental proceeds of the block of flats erected on Ngong/Ngong/11379 together with the income generated from the Trucks registered in the Company's name should be deposited into the company's designated bank account.

Having found that all that property known as Ngong/Ngong/11379, which comprises a block of rental flats erected thereon together with trucks registration Nos. KCL 191Y, KCK 867T, and KAJ 141 U-Grader belong to Calikam Company Limited, it is only fair and just that the income generated from the said properties be deposited into the company's designated bank account for transparency and accountability purposes.

54. In the end, I find that the Notice of Preliminary Objection is without merits and it is hereby dismissed with costs. The application dated 30th August, 2023 is merited. Consequently, I make the following orders –

- i. That an order of injunction is hereby issued restraining the respondent, his servants, agents, and/or employees from selling, alienating, transferring, charging, disposing of, removing, or in any manner whatsoever dealing with the assets of the company pending the hearing and determination of the petition;
- ii. That respondent is hereby compelled to produce the books of records, and bank statements of the company in his custody from 2020 up to date. Production of the said documents shall be made within 60 days of this ruling;
- iii. That all rental proceeds of the block of flats erected on Ngong/Ngong/11379 together with the income generated from the trucks registered in the company's name shall be deposited into the company's designated bank account. Account No. 0730278665175 pending the hearing and determination of the petition. Any drawings made from the said bank account shall be based on the agreement of both parties; and
- iv. Costs shall be in the cause.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 12TH DAY OF APRIL, 2024.
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

NJOKI MWANGI

JUDGE

In the presence of:

Ms Githaiga h/b for Mrs Okulo for the petitioner/applicant

Mr. Katunga Mbuvi for the respondent

Ms B. Wokabi – Court Assistant.

