Lettau v Paradiso Toys Limited & another (Commercial Petition E002 of 2023) [2024] KEHC 3793 (KLR) (16 April 2024) (Ruling)

Neutral citation: [2024] KEHC 3793 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

COMMERCIAL PETITION E002 OF 2023

DKN MAGARE, J

APRIL 16, 2024

BETWEEN

PETRA LETTAU ..... PETITIONER

AND

PARADISO TOYS LIMITED ..... 1ST RESPONDENT

YVES BERTEN ..... 2ND RESPONDENT

RULING

1. This is a ruling in respect of an application 16/8/2023 by Petra Lettau a shareholder of the 1st Respondent. It is made pursuant to Sections 780, and 782 of the *Companies Act* No. 17 of 2018. The Applicant holds 1/3 of the allotted shares and is in effect a minority.

2. The 2nd Respondent is said to be a minority shareholder. The 2nd Respondent is said to be operating the company opaquely. The main complaint being that;

    a. There has been no records for members and directors to interrogate and sensitize.

    b. There is no General meeting held.

    c. Dividends have never been issued.

    d. The 2nd Respondent intended to replace the applicant with one Ton Lambut as a director.

3. The Applicant is said to have been informed that she was removed as a director. Her fears were that the 2nd Respondent was planning to unlawfully make changes to the applicant's position as a shareholder and director.

4. The applicant sought that their disputes be referred to arbitration.

5. The Application is made under Section 7 of the *Arbitration Act* Rule 2 of the *Arbitration Rules* Article 159 of the *Constitution* and salient Sections of the *Civil Procedure Act* and Order 40 Rule 1, 2, 4 and Order 51 Rule 1 of the *Civil Procedure Rules*.

6. The prayers sought were enormous. These are

    a. Spent

    b. Spent

    c. Spent

    d. That this Honourable court be pleased to order that the matter be referred to Arbitration according to clause 33 of the Company's Articles.

    e. That this Honourable Court be pleased to grant a temporary injunction restraining the Respondents from registering any allotment, issuance, or transfer of any shares in the Company in favour of any other party; and selling, disposing of any of the Company's registered assets; pending the reference and determination of the dispute between the Applicants and the Respondents by Arbitration in accordance with clause 33 of the Articles.

    f. That the Honourable court do hereby grant a temporary injunction restraining the Respondents from making changes by adding or removing directors in the company pending the reference and determination of the dispute between the Applicants and he Respondents by Arbitration in accordance with clause 33 of the Articles.

    g. That the Honourable court be pleased to grant orders compelling the Respondents to release forthwith to the Applicant under oath, all company records over the past three (3) years, including the following and any other documents that this court may direct: -

        i. Audited accounts and trial balances

        ii. Bank statements and cashbooks

        iii. Sale and purchases invoices

        iv. Sale invoice for all the goods or products the company sells

        v. Contracts/agreements

        vi. E T R – January 2017 to date

        vii. Payroll

        viii. Loan statements

        ix. List of properties owned.

        x. Breakdown of the work in progress

        xi. Debtors and Creditors listing

        xii. Ledgers.

        xiii. That the honorable court be pleased to make such further or other orders as it may deem just and expedient in the circumstances of this case.

        xiv. That Respondents bear the costs of this Application.

7. The Applicant stated that they fell out in the year 2021, due to the unilateral manner in which the 2nd Respondent was running the company.

8. The application accompanied a petition made under Article 33 of the Company's Constitution Sections 780 and 782 of the *Companies Act*. Section 780 of the *companies Act* provides as doth:

780.(1) A member of a company may apply to the Application to Court by company member Court by application for an order under section 782 on the ground that: -

(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

9. The said section therefore gives the Applicant locus standi to file this petition. on the other hand section 782 of the *companies Act* provides as doth: -

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.

10. They stated that the Applicant's rights were infringed contrary to Section 782 of the *Companies Act* 2015.

11. They also stated that Article 33 of the Companies Constitution allows for Arbitration as a dispute resolution mechanism.

> "Whenever any difference arises between the Company on the one hand, any of the members, their executors, admins, or assigns on the other hand, touching the true intent or construction or the ingredients of consequences of these articles or the statues or touching anything then or thereafter done executed omitted or suffered in pursuance to these articles or of status of touching any breach or otherwise relating to the premises or to any of the affairs of the Company, each such difference shall be referred to the decision of an arbitrator to be appointed by the parties indifference or if they cannot agree upon a single arbitrator, to the decision of two arbitrators of whom shall be appointed by parties in difference."

12. The petition seeks several prayers including secure declaration, audit and injunction.

13. The 1st and 2nd Respondents filed submissions. The replying affidavit was filed by the 2nd Respondent given the nature of the dispute, I take it that it is the 2nd Respondent's response. They stated that scope of interim orders was considered in the case of *Safaricom Ltd v Ocean View Beach Hotel Limited & 2 Others* [2010] eKLR where Nyamu JA, had the following to say in that regard:

> "Interim measures of protection in arbitration take different forms and it would be unwise to regard the categories of interim measures being in any sense closed (say restricted to injunction for example) and what is suitable must turn or depend on the facts of each case before the Curt or the tribunal – such interim measures include, measure relating to preservation of evidence, measures aimed at preserving the status quo measures intended to provide security for costs and injunctions. Under our system of the law on arbitration the essentials which the Court must take into account before issuing the interim measures of protection are: -
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> 1. The existence of an arbitration agreement;
> 2. Whether the subject matter of arbitration is under threat;
> 3. In the special circumstances, what is appropriate measure of protection after an assessment of the merits of the application?
> 4. For what period must the measure be given especially if requested for before the commencement of the arbitration so as to avoid encroaching on the tribunals decisions making power as intended by the parties?"

14. The Respondent stated that that the petition needs to be stayed in tandem with order 25 Rule 4 of the Civil Procedure Rule. These are not serious submissions as I have not seen an application for stay of proceedings. In any case this not the forum nor the means to enforce a decree. The provisions of Section 34 of the *Civil Procedure Act* are germane.

> 34. Questions to be determined by court executing decree
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> 1. All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit."

35. The Respondent relied on two decisions: -

> " a. Patrick Kigera Mathia & another – V Dr. Peter Mungai & 2 Others [2011] eKLR, the court while addressing the issues under Order 25 Rule 4 of the Civil Procedure concluded that where a party is aware of an award of costs on the basis of a discontinued suit hen such party is required to settle the same before instituting a similar suit and the court can on its own motion discontinue such later unit until the costs for the discontinued case are paid first. The court rationale was stated that
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> > "In the circumstances of this matter and so that the defendants are not moved from one suit to another with costs building up due to no acts of their own."
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> b. Davis Mwatela Dzuya & Another – v Salim Anjarwalla [2021] eKLR where the court stayed a subsequent similar suit until the costs of the previously filed suit are paid"

15. The Respondent conceded existence of an arbitration clause. They stated that the same is self-executing. They relied on the case of *Coast Apparel EPZ Limited & Another*, where the Court held that:

> " ..... A party to an arbitration agreement cannot come to Court, in the manner the Plaintiff has done, to seek an order to refer a dispute to arbitration. Inherent in every agreement with an arbitration clause is the requirement for any aggrieved party to refer any dispute to an arbitration forum using the process provided in the agreement ....."

16. They stated that the Applicant has not activated the process 9 months later. They stated that grant interim orders is not automatic. They relied on the case of *CMC Holdings Limited v Jaguar Land Rover Exports Limited* [2013] eKLR, where the court held that: -

> " In practice, parties to international arbitrations normally seek interim measures of protection. They provide a party to the arbitration o an immediate and temporary injunction if an award subsequently is to be effective. The measures are intend to preserve assets or evidence which are likely to be wasted if conservatory orders are not issued. The orders are not automatic. The purpose of an interim measure of protection is to ensure that the subject matter will be in the same state as it was at the commencement or during the arbitral proceedings. The court must be satisfied that the subject matter of the arbitral proceedings will not be in the same state at the time the arbitral reference is concluded before it can grant an interim measure of protection."

17. They state that the Applicant has failed to define the nature of orders sought. *Highland Carriers Ltd – v National Oil Corporation of Kenya Limited* [2021] eKLR, where the Court stated;

> " While Highlands is emphatic that it will refer the dispute that has arisen between it and NOCK to Arbitration, it is less clear on the nature of intervention it will seek before the Arbitrator. Will it be for an order for specific performance or for damages of contract. Without specify, the subject matter of the arbitration is unclear. Because of this lack of clarity, this court cannot find that the subject matter of the Arbitration is under any threat so as to make orders protecting it."

18. They stated that the Applicant has not complied with Section 8and 14 of the *Access to information act*. They stated that the Applicant ceased being a director on 23/5/2022.

Analysis

19. The matter is fairly straight forward. The petitioner sought protection as a minority shareholder. It was not denied that an Annual General Meeting or any meeting of shareholders have not been held. The raison d'etre for not holding the general meeting are irrelevant. These are statutory meetings that must be held even where the parties don't like each other, like in this matter. The fall out appears catastrophic. I agree with Justice M.W. Muigai n the case of *Kithinzi v Kyanzavi Farmers Co Ltd & 6 others (3rd - 7th Respondents sued in their capacity as Directors of Kyanzavi Farmers Co Ltd); Muindi & 8 others* (Defendant) (Miscellaneous Application E006 of 2021) [2022] KEHC 164 (KLR) (15 February 2022) (Ruling)

> "The Annual General Meeting is important in the management and operations of a Company and serves 2 important purposes; as a mechanism of accountability to shareholders and shaping the business of the Company and in compliance with the law. The Company being a separate legal entity (See Salomon Co Ltd v Salomon 1897 AC 22 H.L) and distinct from its shareholders and Directors, the Company operates through human agents ie. Board of Directors appointed in compliance with Articles of Association registered with Registrar of Companies and have conduct of operations and management of the Company in compliance with the law including under Section 276 of *Companies Act* to conduct AGM. So as it is, the Company is acting in contravention of the law and any member is legally entitled to seek redress in Court. Hence the Applicant's application of 25th January 2021.
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> 35. See Agricultural Development Corporation of Kenya v Nathaniel K.Tum & Anor [2014] eKLR where the court observed that;-"Therefore, the directors assume the responsibility of ensuring that the company abides by all legal requirements; all that will preserve its juristic personality and property; and avoiding default that would attract serious legal sanctions, or affect its juristic personality and assets. The legal requirements include; accountability of its business to the shareholders and to the law; operations; directorship; liabilities; assets; payment of taxes, only to mention but a few. Besides liability on the directors, if a company fails to observe the legal responsibilities and obligations set out in law, it will face serious legal penalties and sanctions; some default may occasion temporary disablement but there are others which are dire and may lead to its de-registration or winding-up. Should the gravest of the consequences for non-compliance with the law attach, the juristic existence of the company is decimated and the property may fall bona vacantia to the government."

20. Without an annual general meeting the company runs the risk of being decimated and dying. It is oil that rejuvenates and rekindles the power of the company and maintains it as a living creature. It ensures its rebirth. By failing to hold an annual general meeting they strangle the company and starve it of vital oxygen. It is therefore clear that the allegations of failure to hold an annual General meeting have been substantiated.

21. There is no meting so far held to change directors. Change of directors can only be done during an annual General meeting of a special General meeting. The Respondents addressed everything except

the issues raised by the Applicant. The applicant is still a director till her removal is ratified in an annual general meeting duly convened for that purpose. This has not been convened. Before the meeting is scheduled and a poll called both directors must agree.

22. In the circumstances it is oppressive to refused to give the Applicant information she is entitled to as a director. Calling such information sensitive and keeping it away from her is a classic case of oppression.

28. The next question is whether I should issue an injunction in the circumstances of the case. The standards for an injunction to issue are set out in the locus classic case of *Giella = v = Cassman Brown & Co. Ltd* (1973) EA, 358, 360. The Former Court of Appeal for Eastern Africa, stated as follows, though the wisdom of Spry VP, as then he was, as follows: -

> " The conditions for the grant of an interlocutory injunction are now, I think, well settled in east Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience."

23. Upon finding that the statutory meetings have not been convened, it is without question settled that a Prima facie has been established. The definition of prima facie was elucidated in the case of *Mrao Ltd v First American Bank of Kenya Ltd& 2 others* [2003] eKLR, where the court stated as doth: -

> " 4. A prima facie case in a civil application includes but is not confined to a "genuine and arguable case." It is a case 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."

24. In the case of *Nguruman Limited v Jan Bonde Nielsen & 2 Others* [2014] eKLR the Court of Appeal was of the view that these tests are sequential. The Court stated: -

> " In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;
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> a. establish his case only at a prima facie level,
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> b. demonstrate irreparable injury if a temporary injunction is not granted, and
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> c. ally any doubts as to (b) by showing that the balance of convenience is in his favour.
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> These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See Kenya Commercial Finance Co. Ltd V. Afraha Education Society [2001] Vol. 1 EA 86. If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the Respondent will suffer, in the event the injunction is not granted, will be irreparable.
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> In other words, if damages recoverable in law is an adequate remedy and the Respondent is capable of paying, no interlocutory order of injunction should normally be granted,

however strong the applicant's claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit "leap-frogging" by the applicant to injunction directly without crossing the other hurdles in between."

25. In *Pius Kipchirchir Kogo v Frank Kimeli Tenai* [2018] eKLR Justice Munyao stated as follows:

> " Irreparable injury means that the injury must be one that cannot be adequately compensated for in damages and that the existence of a prima facie case is not itself sufficient. The applicant should further show that irreparable injury will occur to him if the injunction is not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury."

26. The 2nd Respondent expressly admitted to intending opt change structures and have the Applicant removed. It is double speak to approbate and reprobate. I find that unless the orders sought are issued, the 2nd Respondent will irreparably change the status of the 1st Respondent. Interests will be created that cannot be reversed and the properties owned by the company will be sold without the Applicant ever getting to know the status thereof. This is what constitutes irreparable loss. On the other hand, other than temporary set back by a legitimate director, there is no loss the 2nd Respondent will suffer.

27. The next question, though unnecessary, in view of the above finding, is whether the balance of convenience tilts in favour of an injunction. In the case of *Chebii Kipkoech v Barnabas Tuitoek Bargoria & another* [20191 eKLR, the court stated as doth: -

> " The court should issue an injunction where the balance of convenience is in favor of the plaintiff and not where the balance is in favor of the opposite party. The meaning of balance of convenience in favor of the plaintiff is that if an injunction is not granted and the suit is ultimately decided in favor of the plaintiffs, the inconvenience caused to the plaintiff would be greater than that which would be caused to the defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the balance of inconvenience and it is for the plaintiffs to show that the inconvenience caused to them would be greater than that which may be caused to the defendants. Should the inconvenience be equal, it is the plaintiffs who suffer. In other words, the plaintiffs have to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than which is likely to arise from granting it.
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> In this case, the balance of convenience favors the grant of injunction as the plaintiff is in possession. He will be highly inconvenienced if injunction is not granted. On the other hand, the defendants have never utilized the lands for more than 12 years.

28. The balance herein is between allowing the 2nd Respondent to continue making changes without the supreme organ of the company and reaping it apart by acting in a veil of secrecy, lack of accountability and oppression and allowing stopping him in the tracks. The changes can be made later after the arbitrator or the court has done its part. Given that this is a balance between countenancing an illegality on one hand and sticking to the statutory dictates, it is easier to see the side where the balance of convenience tilts.

29. Acts done without statutory dictates are null and void. As Lord Denning MR delivering the opinion of the Privy Council at page 1172 (1) posited in *Macfoy v. United Africa Co. Ltd* [1961] 3 All E.R. 1169 as doth: -

> " If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."

30. The next question is clarity of the issues to be taken for arbitration. There is a clear and succinct breakdown of matters for which the Applicant is seeking arbitration. The question whether certain issues should be with the arbitrator. However the extent of competence of the arbitrator are within the realm of the concept of Kompetenz-Kompetenz. This means the question is left for the arbitrator to decide the limits of article 33 of the Articles of association. In *Euromec International Limited v Shandong Taikai Power Engineering Company Limited* (Civil Case E527 of 2020) [2021] KEHC 93 (KLR) (Commercial and Tax) (21 September 2021) (Ruling), Justice Mativo, as he was then, stated as doth: -

> " In any event, the question whether there exists a dispute or not touches on the jurisdiction of the arbitrator. The arbitrator's jurisdiction can be challenged by attacking the agreement's validity or on the tribunal's jurisdiction over the subject matters, among other challenges. Section 17 of the *Arbitration Act* provides for the doctrine of kompetenz-kompetenz, a jurisprudential doctrine whereby a legal body, such as a court arbitral tribunal, may have competence, or jurisdiction to rule as to the extent of its own competence on an issue before it. The doctrine of kompetenz-kompetenz is enshrined in the UNCITRAL Model Law on International Commercial Arbitration and *Arbitration Rules*. Article 16(1) of the Model Law and article 23(1) of the *Arbitration Rules* both dictate that
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> > "the arbitral tribunal shall have the power to rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement."

31. This settles the question of the issues for determination. The last issue is the lamentation that the Applicant has not moved the process 9 months after invoking this process. The answer is fairly simple. Neither has the Applicant invoked the arbitration process. The matter was before this court and as such it is perfectly in order not to have 2 parallel processes. Arbitration could be invoked before the court decides the matter. However, the Respondents cannot be punished for waiting for the matter to be settled by the court.

32. I therefore find the Application merited and accordingly allow the same. The first 3 prayers are spent while prayers 4 and 5 can be combined.

33. The issue of not activating the arbitration process is otiose. There is no time limit of doing so. The prayer for arbitration is thus a proper one. The application is accordingly merited and I allow the same.

Determination

34. In the circumstances I make the following orders: -

a. An order is hereby issued referring this matter to Arbitration according to clause 33 of the Company's Articles.

b. An injunction is hereby issued restraining the Respondents from registering any allotment, issuance, or transfer of any shares in the Company in favour of any other party; and selling, disposing of any of the Company's registered assets adding or removing directors in the company pending the reference and determination of the dispute between the Applicants and the Respondents by Arbitration in accordance with clause 33 of the Articles.

c. The 2nd Respondent to supply the applicant of all financial and statutory books, bank statements, audited and unaudited book, all usual documents on the running of the company from 2021 to date for use in the arbitration.

d. The applicant shall issue a notice of appointment of an arbitrator for concurrence of the respondent within 30 days from the date of issue. The notice should in any case be issued within 14 days of the decision hereof. Failing any concurrence, the chairman of the Chartered Institute of Arbitrators shall appoint an arbitrator.

e. An order is issued barring removal of the Applicant from the list of directors and if removed her name shall be restored forthwith till the Arbitration is determined.

f. Meanwhile, as the matter proceed for arbitration a conservatory order is issued barring the 2nd Respondent from purporting to act for the 1st Respondent without concurrence of the Petitioner or in any way incurring expenses on behalf the 1st Respondent till determination of the arbitration.

g. The petition is hereby pending determination of the arbitration.

h. Costs be in the Arbitration.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA ON THIS 16TH DAY OF APRIL, 2024.

KIZITO MAGARE

JUDGE

In the presence of:-

R. Munir & Co. Advocates for the 1st and 2nd Respondents

Bashir & Noor Co. Advocate for the petitioner

Court Assistant- Brian