



Kilindini Warehouse (K) Limited & another v Said & another (Commercial Case 5 of 2010) [2024] KEHC 8967 (KLR) (15 July 2024) (Judgment)

Neutral citation: [2024] KEHC 8967 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
COMMERCIAL CASE 5 OF 2010
DKN MAGARE, J
JULY 15, 2024**

BETWEEN

KILINDINI WAREHOUSE (K) LIMITED 1ST PLAINTIFF

AWADH SALEH SAID 2ND PLAINTIFF

AND

OMAR SALEH SAID 1ST DEFENDANT

BARIKA MOHAMED SHERMAN 2ND DEFENDANT

JUDGMENT

1. This matter is an old matter which should have already been determined. For one reason or another, it is still on the corridors of justice about 14 years since it was instituted in court. The case does not appear to be ending. Parties agreed to proceed by way of documents. This appeared to be so agreed since the parties are quite old. Comprehensive statements were filed and parties relied on the same without cross examination.

Pleadings

2. The plaintiffs sought the following prayers: -
 - a. A permanent injunction against the 1st Defendant, his agents, servants and/or employees restraining the 1st defendant from interfering in the running and operations of the 1st Plaintiff company or in any manner whatsoever obstructing and engaging in acts of destabilization of the operations and business of the company or in any way dealing with the assets or properties of the company.
 - b. Costs and incidental of this suit.



3. The 2nd defendant filed defense and counter claim. His case was that the plaintiffs could not alter the shareholding structure. They blamed the directors for fraud for omissions to be registered as a shareholder.
4. It was pleaded that Mohammed Saleh Sherman (deceased) was a shareholder and director and a beneficial owner of the 1st plaintiff.
5. Be that as it may, the Plaintiffs seek to restrain the 1st Defendant from interfering in the running and operations of the Plaintiff company. It is also averred that the 2nd defendant is not entitled to be a beneficial owner or director of the company.
6. In the Plaint dated 8/3/2010 and amended on 19/12/2011, the Plaintiffs sought for a permanent injunction restraining the 1st Defendant, his agents, servants and or employees from interfering in the running and operations of the 1st Plaintiff company or in any manner whatsoever interfering, obstructing and engaging in acts of destabilization of the operations and businesses of the company or in any way dealing with the assets or properties of the company.
 - a. Awadh Saleh Said – No of shares- 39,998 shares
 - b. Hussein Saleh Said – No of shares- 1 share
 - c. Omar Saleh Said – No of shares- 1 share

Total – 40,000 shares
7. It was pleaded that the 2nd Plaintiff's shares amounting to Kshs 39,998,000.00 was arrived at following the fact that the company was then owing the Director Awadh Saleh Said approximately Kshs 40,000,000/-. The Board felt that instead of injecting new funds into the company, as part of the Kshs 40,000,000/= the other two Directors be allotted one share each.
8. That on or about the 28th of June, 1999, the Board of Directors of the 1st Plaintiff company resolved to increase the number of directors from three [3] to four [4] in view of the expansion of the business and duly appointed one Swaleh Awadh Saleh as a Director of the company and was duly allotted one [1] share.
9. That initial two subscribers to the Memorandum and Articles of the Association of the company Hussein Saleh Said and Omar Saleh Said [1st Defendant] failed to pay for the one [1] share each allotted to them and the company resolved on or about the 6th of December, 1999 that each of them forfeits his share in the company due to nonpayment and since they did not represent or were nominees of any interested party in the company they therefore ceased to be directors of the company and the Board resolved that henceforth the quorum necessary for any transaction of the business of company/ Directors be fixed at two Directors present.
10. It was posited that all the brothers ought to have been registered as shareholders in the 1st Plaintiff company but which was not done to the 2nd Plaintiff at the incorporation of the company. The said partnership agreement clearly states at clause 6 thereof that the capital of the partnership will be constituted from the properties of the estate of the said partners' father the late Saleh Sherman Alias Swaleh Nguru.
11. That the 1st Defendant herein having ceased to be a shareholder and Director of the 1st Plaintiff company with effect from the 6th of December, 1999, continues to interfere in the running of the company and unless restrained by this Honourable court he will continue with interference,



- obstruction and destabilization of the operations and business of the company to the detriment of the company, its directors and customers.
12. The Plaintiffs aver that the 1st Defendant's action of interference, obstruction and destabilization of the operations of the company are illegal since he has ceased to be a shareholder and director of the company.
 13. Further, that the resolution was based on the fact that the company owed Awadh Saleh Said Kshs 40,000,000/=.
 14. That sometimes on or about the 26th of July, 1999, the 1st Plaintiff company hereinafter called "the Company" resolved to increase its nominal and issued share capital of 1000 shares of Kshs 100.00 each amounting to Kenya Shillings one hundred thousand [Kshs 100,000.00] only by Kshs 39,900,000.00 [Kenya Shillings Thirty Nine Million Nine Hundred Thousand] only to Kshs 40,000,000.00 [Kenya Shillings Forty Million only] divided into 40,000 shares of Kshs 1,000.00 each since the assets of the company were then approximately Kshs 50,000,000.00 [Kenya Shillings Fifty Million only].
 15. This court had earlier observed that the overriding objective would be defeated if the Applicant's application was not allowed and the applicant was forced, at an extra cost and delay, to file fresh suit against the 2nd plaintiff. It is for that reason the court gave the following orders by Justice Mary Kasango on 15/12/2021: -
 - a. An order is made to join Barika Mohamed Sherman as the 2nd defendant hereof.
 - b. The plaintiff is ordered within 20 days from today's date to file an amended plaint joining the applicant Barika Mohammed Sherman as the 2nd defendant.
 - c. On being served, the said Barika Mohammed Sherman shall file her defence within 15 days.
 - d. The costs of the notice of motion dated 5th April 2011 shall be in the cause.
 16. The Plaintiffs relied on the ruling of this court, (P.J. Otieno J) dated 16/11/2018, in Winding Up Cause No 1 of 2010, where the court declared that the Petitioner lacked locus standi to institute the winding up proceedings as he was not a director.
 17. The 1st Defendant entered appearance and filed defence denying the allegations in the plaint. He averred that the assets of the said Saleh Said aka Swaleh Nguru have to date not been administered and that the same have instead been utilized to generate profits and other assets, among them Kilindini Warehouses (Kenya) Ltd, and in which Mohamed Saleh Sherman and all the brothers and shareholders and equitable owners thereof as a result of which the 2nd Defendant has suffered loss as pleaded.
 18. It was also the case of the 1st defendant that indeed at the time of filing of this suit, he had been unlawfully removed as director but the position had since changed after he was reinstated. The 1st defendant cited Criminal Case No E226 of 2023 *Republic v Awadh Saleh Awadh & 2 others* to state that the Accused in the case admitted to having regularized the position in the CR-12 to reinstate the 1st defendant.
 19. Further, that at no point did the 1st defendant cease to be a director of the 1st Plaintiff. It was his case that they remained 3 shareholders and the share capital of 100,000/= was divided into 1,000 ordinary shares each 100/=.
 20. The 2nd defendant also filed defence and counterclaim on 3/4/2012. The 2nd defendant however did not prosecute or advance his defence and counterclaim.



Submissions

21. The Plaintiffs filed submissions dated 22/1/2024. It was submitted that the action of reinstating the defendants was overstepping the boundaries. That the 1st defendant had no locus standi in 2010 and in 2018. Therefore, the defendants not being shareholders or employees do not have locus standi to participate in the running of the company. They relied on the Ruling in the Winding Up Cause No 1 of 2010 between *Omar Saleh Said v Kilindini Warehouse K Ltd and Awadh Saleh Said*.
22. There are no changed pleadings to show any changed circumstances. Parties must be held strictly to their pleadings.
23. On this basis, it was submitted that the plaintiffs were entitled to a permanent injunction as prayed in the suit.
24. The 1st defendant filed submissions dated 11/12/2023. It was submitted that the plaintiffs were not entitled to a permanent injunction. Further, they submitted that the decision of this court in the winding up petition was of a concurrent court and therefore not binding to this court. That the 1st defendant did not agree with the decision even if he did not appeal against it.
25. In this regard, it was also submitted that the issue of locus standi was determined pursuant to winding up proceedings. That it was not disputed that the defendants were the custodians of the company registry.
26. It was thus the 1st defendant's submitted position that the 1st defendant was still a shareholder in the 1st plaintiff company.

Analysis

27. This is a dispute on the ownership of the 1st Plaintiff company. The plaintiffs seek to bar the defendants from interfering with the operations of the said company on the ground that the defendants are not shareholders or directors.
28. The issue is whether the Plaintiffs have satisfied the threshold for granting a permanent injunction. To get a permanent injunction the plaintiff must satisfy the following criteria.
 - a. Establish that the defendant has no claim regarding the subject matter.
 - b. The plaintiff has an unimpeachable claim to the subject matter.
 - c. The circumstances are not likely to change.
29. In other words, if the parties are in a fluid situation, for example there is an outstanding loan that is not in default, but could potentially be in default, a permanent injunction cannot be issued.
30. In the case of *Kenya Power & Lighting Co. Limited v Sheriff Molana Habib* [2018] eKLR, the court held that:

“It is apparent from the pleadings that the Respondent was seeking a permanent injunction against disconnection of his electricity by the Appellant. A permanent injunction which is also known as perpetual injunction is granted upon the hearing of the suit. It fully determines the rights of the parties before the court and is thus a decree of the court. The injunction is granted upon the merits of the case after evidence in support of and against the claim has been tendered. A permanent injunction perpetually restrains the commission of an act by the defendant in order for the rights of the plaintiff to be protected.



A permanent injunction is different from a temporary/interim injunction since a temporary injunction is only meant to be in force for a specified time or until the issuance of further orders from the court. Interim injunctions are normally meant to protect the subject matter of the suit as the court hears the parties...”

31. In the case of *Bandari Investments & Co. Ltd v Martin Chiponda & 139 others* [2022] eKLR Hon. Justice L.L. Naikuni J, stated as follows: -

“Whether the 1st and 18th Defendants are entitled to be granted the Permanent Injunction restraining the Plaintiff on the suit property. Unlike Temporary Injunction which are granted only to be in force for a specified time or until the issuance of further orders from Court, Permanent Injunction are rather different, in that they are perpetual and issued after a Suit has been heard and finally determined.

Permanent Injunction fully determines the right of the Parties before the Court and is normally meant to perpetually restrain the commission of an act by the Plaintiff in order for the rights of the Plaintiff to be protected. This Court has the powers to grant the Permanent Injunction under Sections 1A, 3 & 3 A of the *Civil Procedure Code, 2010* if it feels the right of a Party has been fringed, violated and/or threatened as the Court cannot just seat, wait and watch under these given circumstances.”

32. The court, in establishing whether a permanent injunction will issue will strive to find out whether in fact the defendants have no legal interest as directors or shareholders in the 1st Plaintiff.

33. The question as to what amounts to proof on a balance of probabilities was discussed by Kimaru, J in *William Kabogo Gitau v George Thuo & 2 others* [2010] 1 KLR 526 as follows: -

“In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred.”

34. In *Palace Investment Ltd v Geoffrey Kariuki Mwenda & another* [2015] eKLR, the judges of Appeal held that:

“Denning J. in *Miller v Minister of Pensions* [1947] 2 ALL ER 372 discussing the burden of proof had this to say; -

“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say; we think it more probable than not; the burden is discharged, but if the probability are equal it is not. This burden on a balance of preponderance of probabilities means a win, however narrow. A draw is not enough. So in any case in which a tribunal cannot decide one way or the other which evidence to accept, where both parties...are equally (un)convincing, the party bearing the burden of proof will loose, because the requisite standard will not have been attained.”



35. It was submitted that as at 5/9/2023, the 1st Defendant held one share each with Awadh Saleh and the 2nd Defendant and at the time of the winding up ruling, there was no shareholder in the company hence the finding.
36. The Ruling in the High Court Winding up Petition No 1 of 2010 was delivered on 16th November 2016 and established that when the Petition was filed in 2010, the Petitioner was not a shareholder or member of the company and so lacked the foundation to mount the Petition and the Petition was as such invalid for want of locus standi.
37. Consequently, the 1st Defendant has no *locus standi* even in this suit and has not established basis for interfering in the affairs of the company. In the winding up petition, which is now reported as *Omar Saleh Said v Kilindini Warehouse (K) Limited & 2 others* [2018] eKLR, the court stated as follows: -
- “53. In *Omega Enterprises Ltd (K) Ltd v Kenya Tourist Development Corporation Ltd* [1998] eKLR the Court of Appeal when adverting on the right to be heard recited with approval the decision by Lord Diplock in Mcfoy’s case (*supra*) to the following effect;
- “The judges in cases that have it set aside save that specifically it includes orders that have been obtained in breach of the rules of natural have drawn distinction between the two types of orders have consciously refrained from seeking to lay a comprehensive definitions of defects that bring an order into category that attracts *ex-debito justitiae* the right to justice!!”
54. It is to this court clear that in purporting to rectify the registrar the Registrar overstepped his statutory powers and violated not only the rules of natural justice but also the rights to property. Such action cannot be made to stand but at the very least cannot be the basis to maintain a court action like this winding up cause.
55. It is also of critical note that the rectification was done while this suit was pending with the sole purpose of giving to the petitioner a pedestal to maintain the petition pursuant to Section 211 of the *Companies Act*, Cap 486.
56. It is clear to me that when the petition was filed in 2010, the petitioner was by the records at the company registry and with the company secretary not a shareholder or a member. If he was not a member he had no locus standi to bring the action and that the registrar purported to reinstate him did not add much. If he had no standing at inception, he lacked the foundation to mount the petition and such foundation could not be erected subsequently to have retrospective effect.
57. I do find that the petitioner lacked the requisite locus standi at the time of filling petition and to date continues to lack the standing. For that reason the petition cannot be maintained but must fail. Consequently the other issues deserve no employment of courts time to consider because if there is no valid petition then there is nothing to be considered on the merits.”
38. The ruling was on 16th day of November 2018. This was 8 years after filing of the suit herein. There is no Court of Appeal orders changing the circumstances. The court found that the Action of the



registrar of companies of altering the shareholding structure of the company was not sanctioned by the shareholders and members and was as such unilateral and invalid by dint of section 118(h) of the Companies Act. The court held as follows: -

“47. This petition having been filed in the year 2010 and in line with the provisions of Section 734(2) of the Insolvency Act, The law applicable to it is the Companies Act, cap 486, now repealed. Section 118 of that Act provides:-

“ 118.

- (1) If-
 - (a) the name of any person is, without sufficient cause, entered in or omitted from the register of members of a company; or
 - (b) default is made or unnecessary delay takes place in entering on the register the fact of any person having ceased to be a member, the person aggrieved, or any member of the company, or the company, may apply to the court for the rectification of the register.
- (2) Where an application is made under this section, the court may either refuse the application or may order rectification of the register and payment by the company of any damages sustained by any party aggrieved.
- (3) On an application under this section the court may decide any question relating to the title of any person who is a party to the application to have his name entered in or omitted from the register, whether the question arises between members or alleged members, or between members or alleged members on the one hand and the company on the other hand, and generally may decide any question necessary or expedient to be decided for rectification of the register.



(4) In the case of a company required by this Act to send a list of its members to the registrar, the court, when making an order for rectification of the register shall by its order direct notice of the rectification to be given to the registrar”.

48. It is overly clear that the law does not allow the registrar to rectify the register so as to add or subtract the name of a person who ought to be added or removed therefore. It is only the court with the legal power to rectify the Register.
49. Now that the only reason the entries in the register, which had subsisted from 2000 was changed in 2015, some 15 years later, were altered is the unilateral action by the registrar, done even without hearing the company and the other persons to be affected by loss of shares, it must be determined if that was lawful or legal.”
39. Therefore the position is as was in the Winding Up Petition. This suit was filed in 2010. The Petitioner in the Winding Up Petition was Omar Saleh Said who is the 1st Defendant in this case.
40. To this court, on the issue as to whether the 1st defendant should be restrained from interfering in the operations of the Respondent, this court finds in the affirmative that the interest of the 1st defendant in the plaintiff company is not supported and the 1st defendant ought not to interfere with the affairs of the company.
41. The court notes that by the resolution of the company dated 28/12/1999, the shares of the company were allotted as follows:
- a. Awadh Saleh Said – 39,998 shares
 - b. Hussein Saleh Said – 1 share
 - c. Omar Saleh Said – 1 share
42. With effect from 14/1/2000, one Victor Arara Were was appointed secretary to the company and Saleh Awadh was appointed as the sole Director. This is the position that the court in the Winding up Petition found to be the valid position since the earlier purported rectifications were not sanctioned by the company.
43. As earlier observed, the 2nd defendant filed defence and counterclaim on 3/4/2012. The 2nd defendant however did not prosecute or advance his defence and counterclaim. It had not been sued but sought to be joined as a party but did nothing more.
44. The Court of Appeal in the case of *Charterhouse Bank Limited (Under Statutory Management v Frank N. Kamau* [2016] eKLR had occasion to consider the burden of proof of the plaintiff where the defendant failed to adduce evidence. The court stated in that case:-

“We would therefore venture to suggest that before the trial court can conclude that the plaintiff’s case is not controverted or is proved on a balance of probabilities by reason of the defendant’s failure to call evidence, the court must be satisfied that the plaintiff has adduced some credible and believable evidence, which can stand in the absence of rebuttal evidence by the defendant. Where the defendant has subjected the plaintiff or his witnesses to cross-examination and the evidence adduced by the plaintiff is thereby thoroughly discredited, judgment cannot be entered for the plaintiff merely because the defendant has not testified.



The plaintiff must adduce evidence, which in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities, it proves the claim. Without such evidence, the plaintiff is not entitled to judgment merely because the defendant has not testified.”

45. On the material before the court, the Plaintiffs did not seek any relief as against the 2nd defendant. The relief was sought only against the 1st defendant. The Plaintiff has maintained that they have no claim against the 2nd defendant. There was no basis laid for the 2nd defendant’s claim.
46. The Supreme Court of Kenya in its ruling on *inter alia* scrutiny in the case of [*Raila Amolo Odinga & another v IEBC & 2 others*](#) [2017] eKLR found and held as follows in an election petition: -

“In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings.....”
47. In the circumstances, I find basis in the Plaintiff’s suit. The 1st defendant is not a shareholder or member of the 1st Plaintiff and was not entitled to take part or interfere in the affairs and running of the said company without authority of the Company.
48. The Plaintiff’s claim is well founded. It has backing of another judicial decision. The 1st defendant was not claiming against the company as a shareholder but that some partnership ought to have had shares. He had not paid for the shares or injected any money. The 1st defendant has not shown that he has a claim over the partnership funds. The question if he ought to have been registered is not a question left to this court.
49. The suit is accordingly allowed. The counterclaim by the 2nd defendant is not supported hence dismissed with no order as to costs. The costs of the suit are governed by Section 27 of the [*Civil procedure Act*](#) which provides as follows: -
 - (1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.
 - (2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.



50. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others*, SC Petition No 4 of 2012; [2014] eKLR, as follows: -

“(18) It emerges that the award of costs would normally be guided by the principle that “costs follow the event”: the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, before, during, and subsequent to the actual process of litigation.... Although there is eminent good sense in the basic rule of costs– that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases.

51. The suit is allowed with costs payable by the 1st defendant. The counterclaim is unprosecuted. It is dismissed with no order as to costs.

Determination

52. In the upshot, I make the following findings: -

- a. A permanent injunction is hereby issued restraining the 1st Defendant, his agents, servants and or employees from interfering in the running and operations of the 1st Plaintiff or in any manner whatsoever interfering, obstructing and engaging in acts of destabilization of the operations and businesses of the 1st Plaintiff or in any way dealing with the assets or properties of the Plaintiff.
- b. The Plaintiffs shall have the costs of the suit.
- c. Counterclaim is dismissed with no order as to costs.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 15TH DAY OF JULY, 2024.

JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of:-

Ms. Oluoch for the Plaintiffs

Ms. Nzamba for the Defendant

Court Assistant – Jedidah

