



REPUBLIC OF KENYA



**Maina v Gichimu (Civil Case E032 of 2021) [2023] KEHC 48 (KLR) (5 January 2023) (Ruling)**

Neutral citation: [2023] KEHC 48 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
CIVIL CASE E032 OF 2021  
TM MATHEKA, J  
JANUARY 5, 2023**

**BETWEEN**

**JEREMIAH MWANGI MAINA ..... PLAINTIFF**

**AND**

**MARGARET NJERI GICHIMU ..... DEFENDANT**

**RULING**

1. On October 21, 2021 the plaintiff Jeremiah Mwangi Maina filed a suit against the defendant Margaret Njeri Gichimu. In the plaint he described himself and herself as the directors of Zajeena Enterprises Limited, a private limited company. His claim was that he incorporated this company on the June 27, 2018 with a nominal share capital of Kshs. 100,000/= . He also claimed that he set up the company hardware business and thereafter he brought in the defendant who was available to run, manage and operate the company hardware business. It was his further claim that he offered her shareholding of 70% equal to 700 ordinary shares, but she never injected any monetary capital into the business.
2. The defendant was directly and solely involved in the day to day running of the company from the time of its launch to date.
3. For its financial transactions the company had a bank account, and an MPESA till number.
4. The plaintiff's claim was that somewhere in 2019, he fell seriously ill, and was bedridden for some time. All this while the defendant was running the hardware. That, upon getting out of hospital he visited the company business only for the defendant to chase him away claiming that he was a stranger to the business. He felt that the defendant had violated her fiduciary duty and set down the particulars of breach. In the suit he is seeking orders;
  - a. A declaration that the actions and intentions on the part of he defendant against the plaintiff are entirely illegal, unfair, unjust, unprocedural amounting to breach of fiduciary duty on her part and a serious upfront to the plaintiff's rights and interests as a co-director.



- b. An order directing the defendant to render just, fair and accurate accounts of the company business assets, funds and profits for the past 3 years and 4 months being the duration from inception of the company business to the date of filing this suit.
  - c. An order directing the defendant to avail in court for inspection, verification and confirmation of all the records relating to the company business from its establishment till date of filing this case.
  - d. An order directing the defendant to disclose and avail current documentary details in terms of Bank Statement of the parallel Bank Accounts in the name of the company through which the defendant has since diverted or deposited company funds.
  - e. An order that the plaintiff do exclusively run and manage operations of the company business for an equal period of 3 years and 4 months without interference or intervention from the defendant.
  - f. An order of permanent injunction restraining the defendant from engaging in unfair, unjust, unethical, illegal and unprocedural activities in breach of fiduciary duty owed to the plaintiff and the Company.
  - g. In the alternative an order directing the plaintiff and the defendant to initiate the necessary legal steps towards the dissolution of the company with a division reflective of each party's capital contribution to the company business.
  - h. Costs of the case with interest at court rates.
5. Together with the suit he filed the notice of motion brought under Order 51 rule 1, Order 40 rule 1 and 2, section 3A, B and 63 ( E) of the [Civil Procedure Act](#), section 1004 and 1005 of the [Companies Act](#), 2015, seeking orders;
1. Spent.
  2. That pending the hearing and determination of this application inter-parties, this honourable court be pleased to order a temporary injunction restraining the Respondent either by himself or agents or servants or employees or any other persons acting on her behalf or consent or authority from operating or running the business affairs or operations of Zajeema Enterprises Limited and any other businesses run or operated within the same business premises.
  3. That honorable court be pleased to order that operations of Zajeema Enterprises Limited Company business located within Pipeline Area in Nakuru County and any other business operated to run within the same premises be temporarily closed pending hearing and determination of this Application for further orders of the Honourable Court.
  4. That pending hearing and determination of the suit filed herewith the Honourable court be pleased to issue a temporary injunction restraining or prohibiting the Respondent either by herself or acting through her agent or servants or employees or any other persons acting on her behalf or her authority from opening and accessing or operating or running the business



affairs or operations of Zajeema Enterprises Limited Company business and/or any other business run or operated within the same business premises.

5. That the honourable court be pleased to order or direct the respondent to avail or supply before the Court the verification, scrutiny and confirmation the latest audited account details of Zajeema Enterprises Limited from June, 2018 to the date of this Application.
  6. That the honourable court be pleased to order or direct the Respondent to render just, fair and accurate accounts of the profit/loss of the company business run and or operated by Zajeema Enterprises Limited for the period between end of June, 2019 to the date of filing this case.
  7. That the honourable court be pleased to order and direct the respondent to avail or table or present the documentary details of her individual or personal initial monetary contribution or capital injected towards the establishment of Zajeema Enterprises Company Limited Business.
  8. That the honourable court be pleased to order and direct that the Applicant do have unhindered access to the company business premises and to be at liberty to run or operate the business for a period equivalent to the duration the Respondent has had the opportunity to run and operate the business being 3 years and 4 months without any interference and/or involvement of the Respondent or at all.
  9. That in an event that the honourable court finds and holds that the running or operation of the Company business as between the applicant and respondent is untenable; the court do direct both parties to initiate the necessary legal steps towards dissolution of the company business and parties to share profits in terms of their capital input upon a joint stock taking exercise.
  10. That the respondent to bear the costs of this application.
6. The application is supported by the grounds on the face of the application and the supporting affidavit of the plaintiff/applicant sworn on October 21, 2021. In these he demonstrates how he set up the company, the sources of the capital, his illness, and the state of the company account to show that the applicant was not depositing money into the company account. That the defendant/respondent was misusing the company resources and had run down the plaintiff's motor vehicle.
  7. The defendant/respondent filed a replying affidavit on November 9, 2021 and a statement of defence on December 15, 2021. In the defence she denied that the plaintiff incorporated the company by himself, she averred that they both made contributions to the setting up of the company and were both to run the company but the complainant stopped contributing in any way. She denied setting up any separate bank accounts for the company. She averred that when the plaintiff fell ill his family abandoned him and she is the one who nursed him back to health. She denied ever chasing him away from the company and stated that it was he who had sent goons to terrorize her, forcing her to report to the police.
  8. In the replying affidavit the defendant/respondent deponed that she was the owner of 700 out of the 1000 shares of the Zajeema Enterprises Limited as per the Certificate of Incorporation filed by the plaintiff. She deponed that the plaintiff was fully employed teacher and could not run the company hence, she did most of the work, that he would pay himself from the company accounts and other times



demand payments from her and to prove this she annexed her bank statements and cheque leaflets which showed moneys paid to the plaintiff applicant. She contended that she paid his hospital bills, and that in 2021 he had wanted to sell his shares. That currently he had paralysed the company business by refusing to transfer money from the paybill account to the company leaving her with a lot of debt.

9. The defendant /respondent added that the applicant was sending his relatives to collect items from the hardware shop without paying. She denied using his motor vehicle. She averred that she was willing to subject herself to an audit of the business and to provide all the necessary documents for the same. She contended that it could not be true that she had not contributed any capital for the incorporation of the company yet she was the largest shareholder, adding that it was not feasible that the applicant would incorporate a company, by himself and just give away 70% of the shares to a person who had not made any contributions.
10. The parties did start the process of an out of court settlement. Ty consent dated November 16, 2021 they agreed to the following;
  1. That: a competent and impartial firm of Auditors be appointed by the parties or in any event, by the Honourable court for the following purposes.
    - (a) in the presence of the parties or their representatives; to take full stock of Zajeema Enterprise Company Business in all respects i.e Assets, Liabilities, profits, losses and Human Resources etc.
    - (b) To establish and ascertain the directors/shareholders starting capital contribution towards the inception of the company business supported by tangible and relevant documentary evidence.
    - (c) Noting that the respondent has used her phone number 0724984890 to transact company business as can confirmed from the documents exhibited through the respondent's replying affidavit; the respondent to supply to the auditors the related Mpesa Account statement with a view to establishing movement of money from or into the company Bank Account and, also, to establish the amount deposited from the said phone into the only company business paybill account.
    - (d) to establish or ascertain if the applicant has ever received, in whichever manner possible, any amount of profits or otherwise since the inception of the company's business to date.
    - (e) To confirm, establish or ascertain the amount of money the applicant has deposited into the company bank account to support the company business from the time of its incorporation to the time of the Audit, and further to confirm if the company owes or does not owe the applicant any amount of money.
    - (f) To establish the mode of transportation the company has used since inception of the company business and in case the company has used hired private transport for its various activities; to establish the related expenses and the ownership of such hired private transport supported by documentary proof.
    - (g) To establish whether or not the respondent, being the managing director, has ever called a meeting of the directors/shareholders to discuss the state of company business.
    - (h) To establish if the company owes any debts or if other persons other than the applicant has ever made deposits into the company bank account at any given time in the history



of the business and if so, what was the purpose of any such deposits and whether the funds so deposited were to be refunded.

- (i) To establish what debts if any the applicant was paying through the cheques annexed to the respondent's replying affidavit i.e on whose behalf the alleged debts were being recovered, how much in total were the alleged debts and where the blank cheques collected by the applicant were taken.
  - (j) To establish how much money is in the paybill account xxxxx deposited by the respondent from the business transactions and how much has the applicant authorized to be transferred from the paybill to the company's Bank Account.
  - (k) To establish how much in terms of stock has been collected from the company business by the applicant's relatives and the school management where the applicant is a teacher at his own set prices as opposed to the company's prices and how much losses are incurred in such an event.
  - (l) to establish the ownership details of the motor vehicle (pick-up) and a motor bike currently used by the company acquired through the proceeds from the company business.
2. That: Both parties be at liberty to supply to the appointed Auditors either directly or through their respective Advocates any and all the relevant documents in their possession or custody including personal bank Account Statements, receipts for stock purchases, agreements and / or any other to facilitate the important exercise.
3. That. both parties to bear the costs of the audit exercise equally.
11. The audit report was filed on February 28, 2022 in court.
12. Both parties agreed to compromise the application through the report and their written submissions.
13. The report is headed "Forensic Audit Investigating Report Zajeema Enterprises Limited" is filed by Fred M & Associates Certified Public Accountants. At page 3, the report contained the following summary key finding;
- a. The company was registered on June 27, 2018 by Margaret Njeri Gichimu and Jeremiah Mwangi Maina as the Directors and shareholders.
  - b. Mr. Jeremiah Mwangi Maina paid Kshs. 10,650 on June 23, 2018 to the registrar of companies for company registration
  - c. Mr. Jeremiah Mwangi Maina has deposited Kshs. 3,211,948 to the company bank account to support the business.
  - d. Mr. Jeremiah Mwangi Maina made capital injections in various forms with intention of supporting the company business of Kshs. 8,147,543.00 from his personal account no. 0310xxxxxheld at Equity Bank Limited.
  - e. Mr. Jeremiah Mwangi Maina made capital injections from his personal MPESA statement mobile number 0720xxxxx registered in his name of Kshs. 576,280 in various forms to support the company.
  - f. Mr. Jeremiah Mwangi Maina received Kshs. 20100 from Margaret Njeri Gichimu as per our audit findings.



- g. During the period June 2018 to December 2021 from verified documents we found out that Mr. Jeremiah Mwangi Maina received Kshs. 2,867,856 from the company and director Margaret Njeri Gichimu.
  - h. Following our stocktake activity as at December 24, 2021 the company had stocks valued at cost Ksh. 2,585,163
  - i. From verified transactions we found out that Mr. Jeremiah Mwangi Maina paid rent to Mr. Jackson Waiganjo Kshs. 210,000/- to support the company.
  - j. We did not get one of the directors (Margaret Njeri Gichimu) bank statements and MPESA statements for the audit period.
  - k. The mode of transport currently in use is Pick up KAL xxxx and Motor Bike KMFHxxx whose owners are Theresiah Mbuthu Kinuthia and Watu Nominees Company Limited.
  - l. From the manual records verified the sales for the period June 2018 to December 2021 we establish the company sales as at 31/12/2021 Kshs. 33,627,494 and purchases of Kshs. 21,055,786
  - m. Zajeema Enterprises Limited paybill number xxxxx had a balance of Kshs. 81,800.00
14. The applicant through his counsel Mr. Ochang Ajigo submits that the audit report demonstrates that the “Respondent did not and has never made any monetary contribution towards the business and all her alleged monetary contributions did not reflect in the business account in any possible form.”
  15. That on the other hand the “applicant made a capital injection into the company through various deposits ....of Ksh. 8,723,823” To that end the counsel submits that the applicant deserves prayers 4, 8, 9 in the application dated 21<sup>st</sup> October 2021.
  16. That the report was prepared by a mutually agreed firm, that the report negates the respondents Replying affidavit and the statement of defence. Counsel argues that the report has even answered all the issues in the suit and in his view there is nothing left to determine save, to grant the plaintiff applicant all the prayers he has sought from this court.
  17. The defendant/respondent counsel Ms. Gikonyo filed the submissions on June 20, 2022. She submitted that the auditors had visited the respondent on January 4, 2022 and collected all the materials. The respondent received the report on February 22, 2022 and the respondent raised concern because from her view of the report the auditors had concentrated solely on the applicant’s involvement in the company instead of the involvement of both the parties.
  18. A supplementary report was filed on April 21, 2022. The auditors had rejected her documents, especially her MPESA statements saying that they were not authentic. It was her position that the said documents could only be authenticated by the maker, in this case Safaricom Limited. The respondent argued that it is only through a full hearing that she would be able to demonstrate her contribution to the company. To that end she cited A. K. Ndung’u J in *Eric Angwenyi Orangi & another v Chive Nyaanga Ogwora & another* [2020] eKLR.
  19. Ms. Gikonyo submitted that the auditors report contained falsehoods. It also reveals that the applicant was not being truthful because during the pendency of the suit, he had withdrawn money from the company accounts, that he was benefitting from a company he had not involved himself in, yet he was the minority stakeholder. The respondent submits that allowing the report to determine the suit



would work injustice against her, and it would only be fair to allow the respondent to present her case on merit.

20. The respondent cited the following cases;

1. *Juliet Karisa v Joseph Barawa & another* Civil Appeal No. 108 of 1988, where the court held that;- “expert evidence is entitled to the highest possible regard and though the Court is not bound to accept and follow it as it must form its own independent opinion based on the entire evidence before it.”
2. *Kagina vs Kagina & 2 others* (Civil Appeal 21 of 2017 [2021] KECA 242 (KLR) (3 December 2021) where it was held that; - “... There is also need for the court to subject such expert testimony to vigorous in depth analysis, weigh it along with all other evidence bearing in mind that the duty of an expert witness is to provide independent assistance to the court by way of objective, unbiased opinion in relation to matters within their expertise with regard to issues in controversy before the Court.

That court further relied on the case of *Stephen Kanini Wang’ondur v The Ark Limited* [2016] eKLR where it was stated;

“In my view its correct to state that a court may find that an expert’s opinion is based on illogical or even irrational reasoning and reject it.. where a court finds that the evidence of an expert witness is so internally contradictory as to be unreliable, the court may reject that evidence and make its decision on the remainder of the evidence. The expert’s process of reasoning must therefore be clearly identified... An expert report is therefore only as good as the assumptions on which it is based..”

21. Finally the respondent argued that it was not plausible that the applicant, a learned person, could hand over 70% of his company to a person who had not made any contributions to the setting up of the company. That if his argument that she was only to run the company was believable, he would have been paying her a salary.
22. The respondent urges the court to disregard the audit report and hear the matter on merit.
23. I have carefully considered the affidavit evidence, the pleadings, the submissions and authorities cited vis a vis the audit report. It is clear that the two related issues that arise for determination are whether the application is merited and whether the audit report filed on February 22, 2022 resolves all the issues in this suit to warrant the granting of all the prayers sought.
24. I have set out herein above the prayer sought in the suit and in the application.
25. The applicant seeks that the respondent be prohibited from opening, accessing, operating, running the business affairs of Zajeema Enterprises Limited Company. From the company registration details, the company was registered with 2 directors, the parties herein. The applicant had 300 shares, the respondent 700 shares, how this happened is not captured in the audit report. Hence at the outset and on the face of it the respondent owns more than half the company. There is no other supporting evidence produced by the applicant to demonstrate that he did everything and only invited the respondent to simply run the hardware shop.
26. The audit report was sought by consent of the parties. It was intended to be an audit report, to demonstrate the status quo of the company because of the mistrust that had developed between the directors. None of the clauses of the consent was to the effect that the findings would culminate in the disposition of the suit. My view is that had the parties so intended, they would have stated as such, in



- any event, when the report was launched, they would have entered into a consent to tell the court that in view of the outcome of the audit report, the suit was now compromised.
27. Now the respondents view is that though they consented to the audit, the audit report is one sided and her evidence was not taken into consideration. That means that what could have been her contribution was not captured by the auditors.
  28. With that kind of complaint and the fact that the auditor, claims with finality that her documents were not authentic, it would only be fair and just to allow her to present the evidence that the auditors rejected, and for the auditors to demonstrate how that evidence, which according to her is before the court, on oath of her affidavit, is fake.
  29. In addition, the application seeks that the respondent supplies specific information to the applicant. Now the status of the company has been revealed through the audit report. The respondent has annexed to her replying affidavit of 9/4/2021 cheque leafs showing money taken out by the applicant; Bank Statements demonstrating her transactions with the company. She has produced Annual Report and Financial Statements for the year ending 2019, and 2020. Essentially the respondent has complied by placing before court the documentary evidence sought by the applicant. The audit report in its key findings, answers to one side's contributions, and evidently the other side is saying their evidence was left out.
  30. My view from the foregoing is that the prayers sought in the suit cannot be granted on the basis of the audit report alone. This court is bound to interrogate the respondent's evidence and to draw its own conclusions as to whether or not it was authentic. To do otherwise would be to throw her off the seat of justice from where justice would be served through a full hearing.
  31. In the meantime the plaintiff/applicant is still the minority shareholder and has rights within the company. The respondent cannot deny him access to a role in the affairs of the company, in any event she has expressed that the applicant is at liberty as a shareholder to come to the business and take accounts (see paragraph 13 of her replying affidavit). In addition it is not entirely true that the applicant has been locked out of the company since his illness. From the evidence supplied by the respondent and which is not controverted by the applicant, he has been involved in the business in the last 3 years, there are cheque leafs for 2018, 2019 and transactions evidenced in the bank statements of 2020.
  32. Clearly therefore the applicant is not deserving of all the prayers sought in the application as the questions he raises have been responded to by the audit report.
  33. Prayer no 9 seeking the dissolution of the company and sharing of profits as per each director's contribution is not available as the evidence of contribution placed before the court by the auditor is disputed.
  34. In my considered view the only prayer available to the applicant in the notice of motion dated October 21, 2021 is prayer 8, where the applicant seeks;

That the honourable court be pleased to order and direct that the applicant do have unhindered access to the company business premises and to be at liberty to run or operate the business for a period equivalent to the duration the respondent has had the opportunity to run and operate the business being 3 years and 4 months without any interference and/or involvement of the respondent or at all.
  35. I allow this prayer only but limited to the extent that the applicant will have unhindered access to the company business premises and to participate in the running of the company pending the hearing and determination of this suit.



36. The rest of the prayers sought have been answered by the audit report.
37. Costs of this application will abide by the hearing of the suit.
38. Orders accordingly.

**DATED, SIGNED AND DELIVERED VIA EMAIL THIS 5<sup>TH</sup> JANUARY 2023.**

**MUMBUA T. MATHEKA,**

**JUDGE.**

C/A Edna

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