



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Shah v Shah & 2 others (Petition E009 of 2022) [2023] KEHC 18162 (KLR)
(Commercial and Tax) (19 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 18162 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
PETITION E009 OF 2022
JWW MONG'ARE, J
MAY 19, 2023**

BETWEEN

RAJNIKANT LAKHAMSHI SHAH PETITIONER

AND

JITENDRA KUMAR LAKHAMSHI SHAH 1ST RESPONDENT

NIMA JITENDRAKUMAR SHAH 2ND RESPONDENT

EAST AFRICAN SEED COMPANY LIMITED 3RD RESPONDENT

JUDGMENT

1. By a petition dated September 8, 2022 (the 'Petition') the Petitioner has moved to this court seeking the following orders;
 - a. A declaration that the first and the second Respondents have engaged in conduct that is unfairly prejudicial and oppressive to the Petitioner.
 - b. A declaration that the intra-Group Transfer of Business arrangement dated April 21, 2020 entered between the 3rd Respondent and Agriscope Africa Limited is null and void.
 - c. A permanent injunction restraining the Respondents from enforcing the Intra-Group Transfer of Business Arrangement dated April 21, 2020 entered between the 3rd Respondent and Agriscope Africa Limited or in any way dealing with the business and assets of the 3rd Respondent as per the said agreement.
 - d. A permanent injunction restraining the Respondents from conducting the 3rd Respondent's business in a manner prejudicial to the Petitioner.



- e. An order authorising the Petitioner to bring civil proceedings in the name and on behalf of the company against the first and the second Respondents under section 162(2) of the [Companies Act](#).
 - f. Costs of this petition be borne by the Respondents.
2. The Petition is supported by the Supporting and Supplementary Affidavits sworn on September 8, 2022 and January 16, 2023 by the Petitioner Mr Rajnikant Lakhamshi Shah. The Petition is opposed by the Respondents who have filed grounds of opposition and a Replying Affidavit sworn by the 1st Respondent Mr Jitendra Kumar Lakhamshi Shah on December 9, 2022.
 3. A brief background to the petition here is that the Petitioner and the 1st and 2nd Respondents are all shareholders in East African Seed Company Limited, the 3rd Respondent, with a shareholding of the Petitioner holding 6,666 shares or the 1.26%; the 1st Respondent holding 523,339 shares or 98.2% and the second Respondent holding 1 share. The Petitioner and the 1st Respondent are brothers while the 2nd Respondent is the spouse to the 1st Respondent. The 1st and 2nd Respondents are also the sole directors of the 3rd Respondent.

The Petitioner's Case

4. In his petition filed before this court, the Petitioner alleges that on or about April 21, 2020, the 1st and 2nd Respondents, acting in their capacity as directors of the 3rd Respondent, entered into an Intra-Group Transfer of Business Arrangement (the 'Business Transfer Agreement') with Agriscope Africa Limited ('Agriscope') which company is closely associated with the 1st Respondent.
5. Further, the Petitioner goes on to state that under the said Business Transfer Agreement, the 3rd Respondent agreed to transfer all its business of breeding hybrid seeds and the distribution of ornamental and agricultural seeds and all its assets and rights used in the conduct of the Business to Agriscope for the sum of Kshs 620,114,133/- (the 'Transfer') in contravention of Section 158 (1) of the [Companies Act](#) which, according to the Petitioner, restricts a company from entering into an arrangement in which a director of the company directly or indirectly acquires a substantial non-cash asset unless the arrangement is approved by a resolution of the members of the company.
6. The Petitioner argued that the 1st and 2nd Respondents approved the sale of the Assets of the 3rd Respondent by a director's resolution, and that no approval was sought from or issued by the Petitioner as a member of the 3rd Respondent for the transfer as required by law. This action by the 1st and 2nd Respondents is what necessitated the filing of this petition before this court. It is the position taken by the Petitioner that failure of the 1st and 2nd Respondents to call a meeting of shareholders and pass a resolution to transfer the 3rd Respondent's Assets prejudiced him. That such a general meeting was an essential meeting in order for a resolution to be reached by all members of the 3rd Respondent on the proposed transfer of the Assets. Further, as a shareholder, he also had a say on the proposed sale of the assets of the 3rd Defendant.
7. The Petition further argues that what is before the court is not a derivative action but that the Petitioner brought this claim under Sections 158, 780 and 782 of the [Companies Act](#). He maintains that he has the right to pursue the present claim for unfair prejudice and oppressive conduct against the 1st and 2nd Respondents without the need for leave to institute a derivative claim.



Respondents Case;

8. The Respondents oppose the petition and have filed grounds of opposition and a Replying Affidavit sworn by the 1st Respondent, Mr Jitendra Kumar Lakhmshi Shah on December 9, 2022. The Respondents averments are that the 3rd Respondent Company is a family-owned entity where all the promoters and historical shareholders were either the 1st Respondent's and the Petitioner's parents and/or their siblings. The Petitioner was never a shareholder in this family business and only became a shareholder after their mother passed on and in accordance with her will, her shares were distributed to her 3 surviving sons.
9. It is the Respondents position that at all material times the Petitioner was kept aware of the proceedings of the 3rd Respondent's and that he was privy to the decisions taken by the 1st and 2nd Respondents on 18th June 2019. Further and in pursuit of transparency and ethical business conduct, the Petitioner and the 1st Respondent met in Mumbai, India on August of 2019 and held a lengthy meeting where the Petitioner was briefed of the business between the 3rd Respondent and Zaad Investment. The Petitioner did not raise any objection at that time and instead, when the Petitioner returned to the United Kingdom, he reduced his understanding of the transaction into an email where he expressly confirmed that the Company's assets would be sold to Agriscope for purposes of facilitating the Zaad Investment.
10. The 1st Respondent depones that a further meeting was held between the Petitioner and the 1st Respondent in 2021 in Nairobi in January 2021, where the Petitioner gave the go ahead for 3rd Respondent and Agriscope to proceed to enter into the Transaction vide an Intra-Group Transfer of Business Agreement dated April 21, 2020, where the Company agreed to transfer its seed related business and assets to Agriscope. The position taken by the Respondents is that the terms of the agreement were on arms-length. Together with the assets, all liabilities related to those assets were also transferred to Agriscope such that the 3rd Respondent's liability in those assets was taken off the 3rd Respondent's books.
11. The Respondents further allege that the entire transaction resulting in the Agreement was done after obtaining professional advice from the Company's financial advisor Maitri Capital. In fact, being fully aware of the need to ensure that the Transaction was done at arm's length terms, it was above board and with full transparency, the Respondents procured the services of PricewaterhouseCoopers (PWC) to provide advice on restructuring and the sale of business and assets. The Transaction (including the valuation principles adopted) was guided by and concluded in accordance with the professional advice of PWC and Maitri Capital. In addition, the seed related assets of the 3rd Respondent were transferred to Agriscope for their full book value in accordance with a Special Purpose Financial Statements which were prepared by the 3rd Respondent's auditors, PKF.

Analysis and Determination: -

12. Both parties have filed submissions which I have considered, alongside the petition and the supporting affidavit and the grounds of opposition and the replying affidavit. It is not lost to me that the 3rd Respondent is a family business and that the members are related by birth or marriage. The parties to this dispute are all family members. It is unfortunate that this court has been called upon to resolve this issue between 2 close family members whose relationship seems to be floundering in stormy waters. In the premises therefore the following issues have been identified by the court for determination:
 - a. Whether the petition meets the legal threshold to commence a derivative action.



- b. Whether the 3rd Respondents are being or have been conducted in a manner that is oppressive or is unfairly prejudicial to the Petitioner.
- c. Whether the orders sought against the Respondents on breach of Section 158 (1) of the Companies Act, 2015 are valid.
- d. Whether in view of the provisions of Section 162 of the Companies Act, the court can issue orders to cancel the to reverse the transaction.

As to whether the present case meets the legal threshold to commence a derivative action.

13. Section 238 of the Companies Act defines a derivative suit as follows;

' Derivative claim' means proceedings by a member of a company—

(a)	In respect of a cause of action vested in the company; and	
(b)	Seeking relief on behalf of the company. I have carefully perused the pleadings by both the petitioner and the respondents in this matter and I note from the outset the petitioner argues that this is not a derivative suit. And that he brings the petition because the actions taken by the Respondent are prejudicial to him as a shareholder.	

14. I note that East African Seed Company Limited, the 3rd Respondent in these proceedings, is a family company whose initial promoters were the 1st Respondent, his parents and some of his siblings in the 1970s. The petitioner has come into the company recently and is a minority shareholder. The Shares of the company are held by the 1st Respondent with an overwhelming majority of 98.74% while the Petitioner holds 1.26% of the shareholding. This is the situation that obtains as at the date the Petition was presented in court. The Company has only 2 directors – the 1st and 2nd Respondents who are related to each other by marriage. The Petitioner neither resides in Kenya nor does he participate in the active day to day management of the Company.

15. Although the Petitioner appeared to suggest that the Kenyan authorities on derivative actions espoused in Gbelani Metals Limited & 3 others v Elesh Gbelani Natwarlal & another [2017] eKLR do not apply because he is not instituting a derivative claim, prayer (e) in his Petition seeks leave of this court to institute civil proceedings in the name of the Company. What the Petitioner is effectively seeking is to institute a derivative claim. To succeed, the Petitioner must convince the court that there is unfair prejudice the nature of which justifies proceedings to be brought on behalf of the Company.



16. Furthermore, the Petitioner has not shown this Court as to what loss the 3rd Respondent has suffered if the assets were transferred for full value. The Business Transfer Agreement pegs a value on the assets. It was incumbent on the Petitioner to demonstrate to the court that the value pegged on the assets was arbitrary and that to demonstrate some loss that the Company suffered as a result of the transaction.
17. Having from onset stated that the suit is not a derivative suit and it is brought for his own behalf as a shareholder, without leave of the court, then the answer to the above issue is no, the suit does not meet the required threshold of a derivative suit.

As to whether the 3rd Respondents affairs are being or have been conducted in a manner that is oppressive or is unfairly prejudicial to the Petitioner.

18. The Petitioner's complaint before the court relates to the execution and subsequent transfer of the assets of East African Seed Company Limited, the 3rd Respondent in these proceedings through a Business Transfer Agreement dated April 21, 2020 without first having procured a shareholders' resolution as required by Section 158 of the Companies Act.
19. It has not been contested by the 1st and 2nd Respondents that the resolution was not passed. In fact, from a perusal of the sworn affidavits of the 1st Respondent Jitendrakumar Lakhamshi Shah filed in this matter being his replying affidavit dated December 9, 2022 and his further affidavit dated April 6, 2023, the Respondents have explained the matter in a simple way. The Respondents assert that the Petitioner was aware of the transaction and that he approved of it in a meeting between the Petitioner and the 1st Respondent in Mumbai in August, 2019. The Respondents have stated that because the Petitioner approved of it, the Petitioner cannot challenge the transaction.
20. Having looked at the Petition, it is noteworthy that the Petitioner does not make any reference to the Mumbai meeting or that he was aware of the transaction. The impression one gets of the Petition is that of an oppressed minority shareholder who had no idea of the transaction and that it was secretly conducted by the 1st and 2nd Respondents. It is only when one ventures into the replying affidavit that the facts of the Mumbai meeting are revealed. The 1st Respondent supplied the court with documentary evidence of hotel bookings paid for by the Company for both the Petitioner and the 1st Respondent.
21. The 1st Respondent has produced evidence of the Petitioner's email of August 28, 2019, where the Petitioner states 'Jitu Please find below minutes of the Meeting.' This is an indication that there was a meeting between the Petitioner and the 1st Respondent. In those minutes, the Petitioner clearly appears to have details relating to the Zaad Investment. However, I have noted that the Petitioner states that 'E A Seed will be sold to Agriscope Ltd' which appears to be the transaction in question. The Petitioner also acknowledges that there are other entities in other African countries which going by his own pleadings in the Petition, he has no interest in.
22. Furthermore, in the minutes, the Petitioner acknowledges that 'PWC will conduct the transaction because of the Investment Structure.' From the Business Transfer Agreement dated 21st April 2020, which is annexed at page 79 of the Petition, it appears to have been prepared by PWC whose logo appears at the bottom left of the page. At paragraph 18 of the Petitioner's Further Affidavit, he denies that professional advisers were consulted in concluding the Business Transfer Agreement. This goes against the evidence on record and his own email where he acknowledged that the 1st Respondent informed him that PWC would be involved in advising on the investment structure.
23. The email paints a picture of 2 shareholders who met and discussed the transfer of the 3rd Respondent's assets. Importantly, there is nothing in the email that suggests that the Petitioner had any reservations



or voiced any opposition to the transaction. From the Petitioner's own minutes, he was aware that the 3rd Respondent's assets would be transferred to Agriscope. In his further affidavit of April 14, 2023, the Petitioner has downplayed the meeting he had with the 1st Respondent. He alleges that he only met the 1st Respondent in Mumbai over breakfast and discussed the transaction for only thirty minutes. If this were true, I find it quite incredible that days after he returned to his home, he penned down what in his own words he called 'minutes' and referred to a 'meeting' with the 1st Respondent. In my considered appreciation of the contents of the minutes, the details given do not come across as someone who was given scanty information over a 30-minute breakfast discussion. The petitioner, to my mind, appears to be a person kept fully abreast of the affairs and the goings-on at the company by his brother.

24. That said, I now turn to the Zaad Investment. Having looked at the agreement between the 1st Respondent and Zaad Holdings Limited dated June 18, 2019, I note that the relevance of this agreement is the 1st Respondent agreeing to form an entity to consolidate the assets in various companies that he controls, into a special purpose vehicle formed for the purpose of conceptualising the investment into the seeds business by Zaad.
25. The court takes note of the fact that the Petitioner is not party to this agreement. The Petitioner has not raised any complaints about this agreement and he has not asserted any interest in any of the entities captured in that agreement, apart from the 3rd Respondent. From the Zaad Investment Agreement, it is apparent that the 1st Respondent wholly owns and controls most of the entities apart from the 3rd Respondent where he is stated to be the majority shareholder.
26. By the time the Petitioner was meeting the 1st Respondent in Mumbai, the Zaad Investment Agreement was already in place. From the contents of the email, the impression this court gets is that the Zaad Investment Agreement was discussed with the Petitioner. Importantly, the Petitioner was aware that the 3rd Respondent's assets would be transferred to Agriscope. The 1st Respondent has averred that the main reason for divesting the 3rd Respondent's seed related business was that, as the only surviving family member actively managing the business his family had cultivated over several decades, it was becoming increasingly difficult for him to singlehandedly continue with its management. The Petitioner has not denied or controverted this.

Whether the orders sought against the Respondents on breach of Section 158 (1) of the [Companies Act](#), 2015 are valid.

27. Against this factual background, it is important to analyse the legal provisions that apply to this Petition. One of the remedies that the Petitioner seeks is for this court to declare the transaction as being null and void pursuant to Section 162 of the [Companies Act](#).
28. Section 162 provides that a transaction entered into in breach of Section 158 is voidable at the instance of the Company, unless:
 - a. Restitution of any money or other asset that was the subject matter of the arrangement or transaction is no longer possible;
 - b. The company has been indemnified in accordance with this section by other persons for the loss or damage suffered by it; or
 - c. Rights acquired in good faith, for value and without actual notice of the contravention by a person who is not a party to the arrangement or transaction would be affected by the avoidance.
29. Before this court can declare a transaction to be void under Section 162, it must be satisfied that none of the conditions set out in (a) to (c) above are applicable. I will proceed to analyse each of these.



30. Firstly, the court must be convinced that restitution of the subject matter of the transaction is not possible. The 1st Respondent has argued that the transaction related to a transfer of the 3rd Respondent's seed related assets. These assets, it is argued, are no longer capable of being restituted because, seeds have been traded in and sold. It is therefore impossible to cause a restitution of these assets.
31. I have carefully perused the Business Transfer Agreement dated April 21, 2020. In that agreement, the 3rd Respondent transferred the Business and Assets of the 3rd Respondent to Agriscope. From the definitions of Business and Assets set out in the agreement, Business is defined as 'the business of breeding hybrid seeds including vegetables and the distribution of ornamental and agricultural seeds carried on by EAS.' Assets is defined as 'all the assets, rights of EAS Kenya used in the conduct of the Business.'
32. It is evident that the assets that were transferred were the seeds related business. The Petitioner alleges that restitution is possible because these assets can simply be retransferred to the 3rd Respondent. I do not accept that suggestion. The Business Transfer Agreement was concluded in 2020. According to the Petitioner's own evidence, the transaction was concluded. Furthermore, according to his own evidence, the Petitioner knew, since 2019 that the transaction would take place. He alleges to be in the dark about the transaction but his own emails suggest otherwise.
- Whether in view of the provisions of Section 162 of the *Companies Act*, the court can issue orders to cancel the to reverse the transaction.
33. The 1st Respondent has submitted another email by the Petitioner of December 2020, which was written further to a phone call between the Petitioner and the 1st Respondent where the Petitioner acknowledges the transaction yet again and expressly acknowledges that the seeds related business was transferred. The question this court must ask itself is why the Petitioner decided to wait for close to 2 years before deciding to approach court to seek to unwind the transaction. It would have been expected that a shareholder who is horrified at being kept in the dark when assets he beneficially owns are transferred secretly, fraudulently and without his knowledge, would approach court to unwind the transaction immediately.
34. To sit back and do nothing for 2 years or more when he knew that the seed business had been transferred, does not paint a picture of a vigilant shareholder intending on protecting the 3rd Respondent's business. Equity aids the vigilant, not the indolent.
35. One of the other limbs when a transaction cannot be voided is where the company has been indemnified for any loss or damage suffered by it. In my view, for the question of indemnity to arise it must first be established that the company has suffered loss as a result of the transaction. The wording of the legal provision is significant, and I quote 'the company has been indemnified in accordance with this section by other persons for the loss or damage suffered by it'.
36. It must therefore follow that the Petitioner has to prove to this Court that the 3rd Respondent has suffered loss as a result of the transaction. The 1st Respondent has submitted that there is no loss to the Company because its assets were sold for full value. In the written submissions as well as his further affidavit, the Petitioner has alleged that there was no valuation. In his further affidavit, the 1st Respondent has stated that the Company's assets were valued in accordance with special purpose financial statements as of April 20, 2020, which were prepared by its auditors PKF a day before the agreement was executed. These accounts were submitted by the Petitioner as an annexure to his supporting affidavit and also supplied by the 1st Respondent.



37. The final limb of Section 162 is that a transaction will not be voided if 3rd parties have acquired rights for value and in good faith and without any notice of any defect in the transaction. The 1st Respondent has submitted that the seed related assets have since been transferred and Zaad has invested into them and acquired rights over those assets. In response, apart from a denial, the Petitioner has not rebutted this allegation. From the Petitioner's own documents, Zaad Investments' public announcements of its investment into the 3rd Respondent and other entities has been annexed. It is evident that a 3rd party has acquired rights in the 3rd Respondent's assets. The question is whether this was for value and without notice of any deficiency in the transaction.
38. Having analysed the rival positions, it is evident that Zaad had no notice of the contravention of Section 158 when they entered into the Zaad Investment Agreement or when the agreement was performed. The Zaad Investment Agreement predates the transfer of the 3rd Respondent's assets. There is nothing to suggest that by the time the agreement was being performed, Zaad had any notice that the 1st and 2nd Respondents had not obtained a shareholders' resolution when they transferred the Company's assets to Agriscope. I find and hold that Zaad has acquired an interest in the assets, for value and without notice of any defect in the transaction and it would thus be inequitable and against the provisions of the Companies Act to unwind the transaction.
39. In my view, having analysed the provisions of Section 162 of the Companies Act and applying the facts at hand, the transaction is incapable of being voided.
40. Interestingly, the only limited reason for instituting these proceedings is to be found at Paragraph 43 of the Petition where the Petitioner would like to bring the Respondents to account in respect for gains that they may have made in respect of the transaction.
41. Firstly, the question that this court must ask is whether civil proceedings by the company is the appropriate method through which the Respondents should be called to account for any gains they may have made as a result of the transaction. As a shareholder of the Company, the Petitioner can simply demand for accountability from the directors of the Company, the 1st and 2nd Respondents and ask them to account for any gains that they may have made as a result of the Company.
42. It has not been demonstrated that the Petitioner has demanded or requested for such accountability and that the Respondents have refused to do so. Furthermore, it was imperative on the Petitioner to demonstrate, through evidence, that there was gain made by the Respondents. I have not seen any evidence of gain made from the assets.
43. Having analysed the evidence before me, I am not satisfied that the transaction in question warrants being overturned or voided. Apart from not meeting the legal threshold for voiding the transaction, I find and hold that having been aware of the transaction and having voiced no objection or opposition to it, the Petitioner approved the transaction. The Petitioner cannot, at this stage, be allowed to resile from his position. In any event, it is my view that even if the Petitioner had opposed the transaction at a general meeting of the members (the Petitioner and the 1st Respondent), he would not have been able to carry the day since what was required for the transaction to be approved was a simple majority. The 1st Respondent being a supermajority shareholder, the Petitioner would not have been able to stop it.
44. Furthermore, as the policy decision behind Section 158 of the Companies Act is asset stripping by directors to the detriment of shareholders, I find and hold that a transaction having been approved and concluded by a supermajority shareholder to an entity that he himself owned and controlled, was outside the scope of a Section 158 approval considering the express provisions of Section 159 which were applicable to the transaction.



45. In concluding, I would like to analyse and deal with the orders sought by the Petitioner.
46. The declaration sought by the Petitioner against the 1st and 2nd Respondents of unfairly prejudicial and oppressive conduct cannot issue as no such conduct has been identified. The court declines to void the business transfer agreement dated April 21, 2020.
47. The permanent injunction restraining the Respondents from enforcing the Intra-Group Transfer of Business Agreement dated April 21, 2020, cannot issue. An injunction being an equitable remedy must be viewed through the lens of the maxims of equity. I find that the Petitioner having withheld in his Petition evidence that he met the 1st Respondent and discussed the transaction with him, and knew that the seeds related business would be transferred to Agriscope and acknowledged the fact that the Company no longer owned the seeds related assets on December 7, 2020, an injunction cannot issue. Apart from his non-disclosure, the Petitioner is also guilty of laches. Having been aware of the fact that the assets had been transferred, the Petitioner sat back and chose to wait for close to 18 months before coming to court. Equity aids the vigilant, not the indolent.
48. Furthermore, I am not convinced that I can stop the enforcement of an agreement entered into on April 21, 2020, three (3) years down the line. By his own email of December 7, 2020, the assets have been transferred. To issue an injunction against the assets being transferred would be an order in vain. It is trite law that courts do not issue orders in vain.
49. In relation to prayer D seeking a permanent injunction against the Respondents from conducting the 3rd Respondent's business in a manner prejudicial to the Petitioner, I find and hold that no conduct has been specified to this Court about how the Respondents are conducting the 3rd Respondent's business in a prejudicial manner. That prayer fails.
50. As to the order sought to institute civil proceedings in the name of the Company to seek an account from the 1st and 2nd Respondents under Section 162 (2) of the *Companies Act*, I do not see any merit in the prayer. I am not convinced that instituting proceedings in the name of the Company is the correct approach in bringing the Respondents to account. I have already held that the Petitioner has not demonstrated that the transaction has resulted in a gain to the Respondents. The assets have been demonstrated to have been transferred for their full value.
51. The assets were transferred together with their attendant liabilities and it is evident that the transaction met the tenets of fairness and resulted in value to the Company. For these reasons and the reasons stated above, I decline to issue the prayers sought in the Petition.
52. The upshot of the findings above is that the Petition before this court is dismissed in its entirety with costs to the 1st and 2nd Respondents.
53. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 19TH DAY OF MAY 2023.

.....

J. W. W. MONG'ARE

JUDGE

In the Presence of:-

- 1. Mr. Ndungu for the Petitioner.**
- 2. Ms. Kamau for the Respondent.**



3. Sylvia- Court Assistant

