



**TRT Investments Limited v Mwalo & 3 others (Civil Case E223 of 2023)
[2023] KEHC 19305 (KLR) (Commercial and Tax) (26 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 19305 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE E223 OF 2023
A MABEYA, J
JUNE 26, 2023**

BETWEEN

TRT INVESTMENTS LIMITED PLAINTIFF

AND

BRAMUEL MWALO 1ST DEFENDANT

XETOVA INC 2ND DEFENDANT

XETOVA LIMITED 3RD DEFENDANT

EXTRA DIMENSIONS COMPANY LIMITED 4TH DEFENDANT

RULING

1. This is a ruling on an application dated May 23, 2023 by the plaintiff. That application was brought under Sections 238, 780(1), 782, 786, 787, 797, 1004(1)(b) and (2) of the *Companies Act* and Order 42 Rules 2 and 4 of the *Civil Procedure Act*.
2. The application sought several orders. The prayer for appointment of an inspector for the 3rd respondent was granted on May 28, 2023. What remained was the prayers to permit the inspector to examine, interview persons concerned with the affairs of the 3rd respondent. That the inspector be permitted to engage the services of a reputable firm of accountants to assist him in his said task.
3. When the matter came up for directions on May 31, 2021, all the parties were represented. The court gave directions and timelines for filing of replies and skeletal submissions. The court limited such time to 10 days for the reason that the matter had been certified urgent and the court was not willing to give orders *ex-parte*. The court fixed the matter for highlighting of the submissions on June 13, 2023.



4. Come the June 13, 2023, none of the respondents had complied with the directions given on 31/05/2023. All of them, in breach of Section 1A (3) of the Civil Procedure Act, waited until the event of the date for highlighting and purported to file preliminary objections and an application to set aside the order made on May 28, 2023. Obviously, the respondent did not want to proceed with the matter. They intended to have it collapse for their own reasons. The court ruled that since the respondents had not complied with the clear and express directions of May 31, 2023, they were in contempt of court. They had not filed any response to the application. They had filed documents out of time with the hope that the court will grant an adjournment.
5. By a ruling made on that day, the court directed that the Motion dated May 26, 2023 will proceed on the basis of the directions given on May 31, 2023. Since none of the respondents had complied with the said directions, the application was basically unopposed.
6. Nevertheless, the court decided to consider the application on merit and deliver its ruling thereon. The grounds for the application were set out in its body and in the supporting affidavit of Greg Mitchell sworn on May 23, 2023.
7. The grounds were that out of representations by the 1st respondent, the applicant invested a total sum of US\$ 1,900,000/= between June and October, 2022. That however, the 1st respondent had failed to act on the material terms in respect of which the applicant had invested into the 2nd and 3rd respondents. He had resisted and refused to facilitate the establishment of a board to oversight the operations of the 2nd and 3rd respondent. Further negotiations led to additional loans amounting to US\$ 1,480,000/= to the 2nd respondent.
8. That the 1st respondent had become evasive and there was collusion between the respondents to defraud the applicant of its investment totaling US\$ 2,960,000/=. The applicant was apprehensive that a sum of US\$1,900,000 invested as equity may have been diverted. When Grant Thornton interrogated the finances of the 3rd respondent, a lot of irregularities were discovered bordering on fraud, manipulation of bank records among other ills. That it was therefore proper to have an independent inspector to undertake a review of the respondents as prayed.
9. All these averments made on oath were never challenged nor denied. There is evidence that a sum of US\$ 1,900,000 was paid out of which the applicant was to own 49% equity in the 3rd respondent. There are allegations of loans advanced and monies wrongfully diverted. A report by Grant Thornton found irregularities which can only be properly unearthed if there was to be a proper audit of the 2nd and 3rd respondent.
10. Under section 786 of the Companies Act, a member who has not less than 10% of the nominal value of the Company's Share Capital. There is allegation that the applicant is not a member of any of the companies. However, there is evidence that a sum of US\$ 1,900,000 was paid for 49% shareholding. The 1st respondent cannot hide behind his fraudulent acts to bar the applicant from pursuing its rights under the law. A party cannot be allowed to benefit from his own wrong.
11. Having considered the matter in totality, the evidence on record and the law, I make a finding that, the Court has jurisdiction to make the orders sought. That a case has been made for the grant of the orders sought.
12. Accordingly, the application dated May 28, 2023 is hereby allowed as prayed.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 26TH DAY OF JUNE, 2023.



A. MABEYA, FCIArb

JUDGE

