Savani v Plastic Products Co Ltd & 3 others (Petition E007 of 2022)
[2023] KEHC 21692 (KLR) (Commercial and Tax) (21 July 2023) (Ruling)

Neutral citation: [2023] KEHC 21692 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

PETITION E007 OF 2022

FG MUGAMBI, J

JULY 21, 2023

BETWEEN

JITU TRIBHOVANBHAI SAVANI ..... PETITIONER

AND

PLASTIC PRODUCTS CO LTD ..... 1ST RESPONDENT

MULTI PACKAGING LTD ..... 2ND RESPONDENT

PARAG BHAGWANJIBHAI SAVANI ..... 3RD RESPONDENT

SHAYLAAN PARAG SAVANI ..... 4TH RESPONDENT

RULING

Brief Facts

1. This is yet another family feud over the management and control of family businesses, being, Plastic Products Co Ltd (the 1st respondent) and Multi Packaging Ltd (the 2nd respondent). The petitioner/ applicant and the 3rd respondent are both directors and shareholders in the 2 companies.

2. The application dated July 14, 2022has been filed by the petitioner and the application dated July 22, 2022 filed by the 3rd respondent. Pursuant to the directions of this Honourable Court, both applications will be determined instantaneously.

The application dated 14th July 2022.

3. The application is brought under section 780 and 782 of the *Companies Act*, section 3, 3A and 63(e) of the *Civil Procedure Act*, Order 50 of the *Civil Procedure Rules* 2010 and all other enabling provisions of the law.

4. It seeks the following orders:

    i. Spent

    ii. Spent

    iii. That pending the hearing and determination of the petition herein; this Honourable Court do issue an order restraining the 3rd respondent, either through his agents, servants or proxies whatsoever from appointing his son and/or from any further involvement to the 1st and 2nd defendant company; that is to say,

    iv. An interdict do issue against Mr. Shaylaan Parag Savani from intermeddling in whatsoever manner with the affairs of the 1st and 2nd Respondents or acting in whichever capacity in the said affairs of the 1st and 2nd respondents companies

    v. An order do issue against the 3rd respondent restraining him from conducting the affairs of the company without due consultation with the petitioner; in consideration of his roles both as a Managing Director and as shareholder of the 1st and 2nd respondents.

    vi. That the 1st and 2nd respondent Companies do abide by the orders issued in a) and b) above.

    vii. That the costs of this application be provided for.

5. The application is premised on the grounds on the face of it and the supporting affidavit sworn by Jitu Savanion October 26, 2022.

6. In summary, the petitioner faults the 3rd respondent for conducting the affairs of the companies in a manner that is prejudicial to him and to the companies' shareholders. The petitioner specifically takes issue with the appointment and renumeration of the 4th respondent, the decision to purchase and dispose of machinery all of which were done without consulting him as Managing Director of the 1st and 2nd respondent companies.

7. The petitioner has invoked thishonourable court's jurisdiction under section 780 and 782 of the *Companies Act* 2015 so as to stop the oppressive conduct and unfair prejudice occasioned to his interests.

8. The application was opposed by way of a replying affidavit sworn by Parag Savani, the 3rd respondent, on August 5, 2022. The 3rd respondent argues that the petition is bad in law and ought to be struck out as it conjoins proceedings against 2 companies and further that it does not disclose any cause of action under the *Companies Act* to justify the exercise of jurisdiction by this court.

The application dated 22nd July 2022

9. The application was brought by the 3rd respondent. It cites no specific section of the law but states that it has been brought under the inherent jurisdiction of the court. It seeks the setting aside of the interim orders of July 15, 2022 vide the following prayers:

    i. Spent

    ii. That order no 3 of the ex-parte orders made on July 15, 2022be set aside

iii. That in the alternative to prayer 2 above, order no 3 of the exparte orders made on July 15, 2022be stayed pending the hearing and determination of this application.

iv. That petition filed herein be struck out with costs to the 3rd and 4th respondents.

v. That the costs occasioned by this application be provided for.

10. The application is supported by the grounds on the face of it and the supporting affidavit sworn by Parag Savani, the 3rd respondent, on July 22, 2022. The 3rd respondent observed that the court did not have jurisdiction to grant any interim relief under sections 780 and 782 of the Act. It was contended that the petition was incompetent and an abuse of the court process as it was not permissible to file a joint petition in respect to the companies.

11. Further, the 3rd respondent contended that the exparte orders were obtained on material nondisclosure of the fact that there were live proceedings pending before the court where the petitioner instituted proceedings against the 3rd respondent and his father in HCCOMM NO 130 of 2014 and HCCOM 197 of 2015 against the 3rd and 4th respondents and the same were dismissed by the Court of Appeal.

12. The 3rd respondent stated that together with the 4th respondent they were exposed by the exparte order of the court as it gave the petitioner free license to deal with the companies as he pleased to their detriment.

13. The application was opposed by a replying affidavit sworn by the petitioner Jitu Savani on August 4, 2022.

Analysis

14. Both applications were canvassed by way of written submissions which I have carefully considered alongside the rival pleadings, evidence and authorities filed by the parties in support of their cases.

15. The first issue that this court must deal with is the question of jurisdiction and competence of the petition before thecourt. The 3rd respondent argues that the petition is incurably defective as it was presented as a compound petition and that it was not permissible to file a joint petition with respect to 2 companies. To this the petitioner argued that the joinder of the 1st and 2nd respondent companies was done so as to achieve a speedy resolution in a cost-effective manner. The 3rd respondent relied on the Court of Appeal decision involving the same parties, being Parag Bhabwanjighai Savani v Jitu Tribhovanshai Savani & 2 others, [2017] eKLR. The court had pronounced itself thus:

> "It is also apparent that on a proper reading of the relevant provisions of the Act it was not open to Jitu to bring a compound application herding together the three companies in seeking the inspection orders."

16. The observations by the Court of Appeal are binding on this court. This court restates these findings in that it would have been prudent for the petitioner to bring different causes of action against the 2 companies, although I also note that the Court of Appeal went ahead to determine the substantive issues in the petition that were before it.

17. Likewise, the question that then begs in the current proceedings is, could the pleadings be cured by an amendment? There appears to be a general view that the court will not dismiss a proceeding merely on procedural grounds unless there is good cause to do so. I say this relying on the case of *Yaya Towers*

Limited v Trade Bank Limited (In Liquidation), Civil Appeal No. 35 of 2000 in which the court expressed itself thus:

> "No suit should be summarily dismissed unless it appears so hopeless that it is plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment."

18. Order 1 Rule 9 of the *Civil Procedure Rules* also restates this position in the following terms:

> "No suit shall be defeated by reason of the misjoinder or non- joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it."

19. Numerous judicial pronouncements point towards the generally accepted view that striking out of pleadings should only be a last resort, where the defect in the pleadings is incapable of cure by amendment. The petitioner invites this court to further refer to the spirit behind article 159(2)(d) of the *Constitution*. It is therefore my view that the matter can be cured by an amendment and there is no reason to strike out the petition.

20. The 3rd respondent further opines that this Honourable Court is devoid of jurisdiction to grant any interim relief under sections 780 and 782 of the *Companies Act*. In the 3rd respondent's opinion the petitioner ought to have sought leave to file a derivative action as it is the companies' interests that he seeks to enforce, as opposed to the proceedings under section 780 of the *Companies Act*.

21. For the avoidance of doubt, section 780 of the *Companies Act* provides as follows:

> 1. A member of a company may apply to the court by application for an order under section 782 on the grounds—
>
> (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 petitioner); 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."

22. Upon the court being satisfied that the affairs of the company are being conducted in an unfair and prejudicial manner, it may grant the reliefs set out in section 782 of the Act which provides that:

> "(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 petitioner has complained it has omitted to do;

iii. 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;

iv. require the company not to make any, or any specified, alterations in its articles without the leave of the Court;

v. 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."

23. The fact that the petitioner is a director and shareholder of the 1st and 2nd respondent is not controverted. This gives him a right as a member of the company to invoke temporary relief under section 780. From a reading of the relevant provisions, I find no difficulty in holding that this honourable court has been properly invoked and that it has jurisdiction to hear and determine the application before it and to grant the reliefs sought by the petitioner.

24. Just what is it that amounts to oppressive and prejudicial conduct? Parties have referred to the case of *Velani & 6 others v Naran & 2 others*, [2021] KEHC 75 (KLR), with which this court concurs. The learned judge held that oppressive and prejudicial conduct is that which is burdensome, harsh and wrongful, or which lacks probity and fair dealing in reference to the affairs of the company. Further, in order to establish unfair practice, the Court stated that two elements must be present:

"(a) the conduct must be prejudicial in the sense of causing prejudice or harm to the relevant interest of the members or some part of the members of the company (i.e. shareholders), and,

(b) it must be unfair within the context commercial practices."

25. Against this background and on the strength of the law and legal decisions as I have set out, I now turn to considering the substance of the applications before the court.

26. For the court to reach a just determination, it must carefully consider the conduct of the parties. The present circumstances present a most unique challenge. The petitioner confirms that the relationship between himself and the 3rd respondent has broken down irretrievably to an extent that they have not sat for a meeting concerning the running of company affairs for over 5 years. This would certainly have an impact on the relationship between the directors and the operations of the company.

27. Turning to the complaint by the petitioner on the decision to purchase machinery and dispose of equipment which were done without the petitioner's consent, I note that the same is not controverted by the 3rd respondent. The 3rd respondent however avers that there is an established practice whereby each of the directors would make decisions in their specific areas of management. It is not clear whether this was the role of the 3rd respondent as the same was not canvassed beyond that.

28. The evidence placed before the Court also indicates that at a meeting of November 9, 2015where the petitioner and 3rd petitioner was present, the Board discussed the issue of machinery investment although no resolutions were made. While there is no evidence that the machinery therein relates to the present dispute, the same may provide an insight on how much knowledge the petitioner may have

had on the issue. In fact, the petitioner goes on to add that he paid for the machinery upon receipt of the invoices by the suppliers.

29. The petitioner further takes issue with the employment of the 4th respondent by the 3rd respondent, without consulting the petitioner. The petitioner goes on to acknowledge that other than the 4th respondent, the 3rd respondent has in fact appointed another 63 members of staff also without the consent of the petitioner. This averment goes to support the statement made by the 3rd respondent that in fact, the norm has been for both parties to make appointments in their respective areas of operation, a position that the petitioner has not rebutted. If this is the case, it follows that to single out the 4th respondent amongst many other employees that the 3rd respondent had employed would an unfair practice as against the 4th respondent and not in the interests of the companies.

30. The 3rd respondent, in his defence, argues that the company required the services of an ICT expert considering the massive IT upgrade that the company had undertaken. He asserts that the 4th respondent was qualified for the position, a statement that the petitioner denies but acknowledges the magnitude of the technology investment by the companies. The petitioner has not shown any viable alternative that would have been able to carry out the task for the benefit of the company.

31. As for the 4th respondent's renumeration which the petitioner avers is equivalent to that of a director, the same was termed as unjustified, unconscionable and meant to drain the company resources. This averment stands on shaky ground because the court has not been furnished with policies or details of salaries of other employees on the same scale to be able to decide on the question. I note that the 4th respondent is a son to the 3rd respondent. This in itself does not stop the employment of the 4th respondent in a family owned business.

32. My overall view is that the petitioner has not proved what harm has been occasioned or will continue to be occasioned to the companies and shareholders if the 4th respondent continues to act as an employee of the company pending the hearing and determination of the petition.

33. The other bone of contention is with respect to the position of Managing Director. The petitioner states that he is the Managing Director in the 1st and 2nd respondent companies, a position that the 3rd respondent denies but acknowledges that they both have specific duties relating to the companies. The 3rd respondent in fact denies that the petitioner has any veto powers stating instead that neither the petitioner nor the 3rd respondent holds any veto power over the other. I have perused the Articles of Association for the 2 companies and I note that the same do not provide for the said position.

34. In the absence of any such provision and the fact that the petitioner did not produce any resolution to prove his appointment as Managing Director and the specific roles assigned to him, the court is unable to make a finding on this question.

35. Finally, it is trite that this Court has held in previous judicial pronouncements that exclusion from management in circumstances where there is a legitimate expectation of participation, abuses of power and breaches of the Articles of Association are examples of what may amount to unfair prejudice. (See *Velani & 6 others v Naran & 2 others*, (Petition E002 of 2020) [2021] KEHC 75 (KLR). On account of all the circumstances placed before the court, I am not satisfied that the petitioner has provided evidence before the court of serious departure from fair standards of fair dealing or unfair prejudice under the circumstances. This is more so noting that there are serious issues between the petitioner and the 3rd respondent that render it difficult to run the companies in a normal way.

36. For the reasons that I have stated, and guided by the principles in *Giella v Cassman Brown Co. Ltd*, [1973] EA 358, I am certain that the element of a prima facie case with probability of success has not

been established. The petitioner has not shown that the 3rd respondent has acted in a manner contrary to the company's articles so as to be restrained from involvement in the 1st and 2nd defendant companies. Secondly, I agree that the petitioner will not suffer irreparable loss. Any loss that he is likely to suffer can be determined and compensated by an award of damages if the orders of injunction is not granted. Finally, I am of the considered opinion that the balance of convenience lies in granting the orders in favour of the 3rd respondent.

37. Finally, in my assessment, this is a clear case of a deadlock between the directors and in particular, the petitioner and the 3rd respondent to which both are guilty of advancing. It is not therefore difficult to see why the petitioner lays these claims against the 3rd respondent. At the heart of the dispute in fact, lies the issue of who controls the 2 respondent companies.

38. The answer to this question will ultimately determine how the company's property is used, what transactions are entered into or approved and how the companies are run. The only way that this dispute can be resolved is for the Board of Directors to hold a meeting so as to bring some order into the companies. The state of affairs where business operation relies on court orders is not sustainable.

Determination and Orders

i. Since the petitioner has not made out a case for oppression and unfair prejudice, I am constrained to dismiss the application dated July 14, 2022. In the same vein and for the reasons that I have stated, the application dated July 22, 2022succeeds to the extent that the order no 3 of the ex-parte orders made on July 15, 2022 are hereby set aside

ii. I further direct the 1st and 2nd respondents to convene a meeting of the Board of Directors within a period of 30 days, from the date of this order so as to unlock the deadlock on management of the company.

iii. Costs shall abide in the petition.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 21 ST DAY OF JULY ,2023.

F. MUGAMBI

JUDGE

Court Assistant: Ms. Lucy Wandiri.