



REPUBLIC OF KENYA



**Gichohi & 4 others v Muthoga & 3 others (Civil Suit 13 of 2016)
[2023] KEHC 23818 (KLR) (19 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 23818 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CIVIL SUIT 13 OF 2016
M MUYA, J
OCTOBER 19, 2023**

BETWEEN

**HEZEKIAH WANGOMBE GICHOHI 1ST PLAINTIFF
HEZY JOHN LIMITED 2ND PLAINTIFF
ALLIMEX LIMITED 3RD PLAINTIFF
HII INVESTORS LIMITED 4TH PLAINTIFF
CAROLINE W. KAMARU 5TH PLAINTIFF**

AND

**DAVID MUTHOGA 1ST DEFENDANT
ANTONY WAGURA IKIKI 2ND DEFENDANT
PETER GICHOHI GITAU 3RD DEFENDANT
UMOJA SERVICE STATION 4TH DEFENDANT**

RULING

1. The amended notice of application dated the 13th day of May 2022 seeks the following orders.
 - i. Spent
 - ii. Spent
 - iii. That pending the full implementation of the mediation settlement agreement already adopted as an order of this court, the defendants herein whether by themselves, their servants and or agents be restrained from recruiting, employing or otherwise engaging a new Auditor in respect of the accounts and affairs of the 4th defendant and its subsidiary Urumwe service station limited.



- iv. That M/s Wanja, the company accountant who has been working for the company before she was verbally suspended be allowed to continue serving as an accountant pending full implementation of the mediation settlement agreement.
 - v. That the Defendants herein be ordered to refund to the 4th Defendant all the moneys, revenue, rents paid to Urumwe service station Ltd A/c 0152593089300 belonging to the 4th Defendant.
 - vi. That pending the full implementation of the mediation settlement agreement the former directors who were in office before the disputed election of 27th November 2015 except the 2nd Defendant Samuel Gichuhi and Caroline W. Kamaru Abuor be allowed to serve as the only directors to manage and run the affairs of the company on an interim basis.
 - vii. That in the alternative the court issue appropriate orders for the running of the company in the interest of the shareholders.
 - viii. That this court extend the terms of reference for the audit to include the auditor taking the Statutory audit for the period 2016 to 2021 both for the 4th Defendant and its subsidiary Urumwe service station.
 - ix. That pending the final implementation of the settlement agreement already adopted as an order of the court, that the Defendants or their agents be restrained from paying dividends to shareholders renovations of the 4th defendants properties as well as those of the other sister company Urumwe Service station or any other substantial expenditure which will amount to devaluation of the shares of the said companies.
2. This motion is supported by the affidavit of Hezekia Wangombe Gichohi sworn on 13th May 2022.
 3. On behalf of the 1st and 2nd and 4th Defendants one David N. Muthoga filed a replying affidavit dated 25th March 2022 opposing it. There is another Notice of motion application dated the 16th day of May 2022 brought by the court appointed Auditor in which he seeks the following orders:-
 - i. That the orders of the court dated 6th May 2021 be varied to allow the applicant to access the 4th Defendants premises for the purposes of conducting the court mandated audit and in accordance with the international standards on audit.
 - ii. The 4th Defendant be ordered to avail its employees including the General Manager for interviews with the applicant to provide further information and documentation for verification and to facilitate the availability of the selected shareholders.

Background

4. On 18th December 2018, by consent of the Parties, this matter was referred to mediation. Subsequently, a settlement was arrived at dated 14th March 2019. Same was filed in court and adopted as an order of the court. It was in the following terms:-
 1. Umoja Service Station be dissolved as provided for in its articles of association and the *companies Act*.
 2. An audit to be conducted on the company's shares to establish what each of the company members own and the parties to ask the court to elect a date for them on when the audit to be conducted.



3. An independent auditor to be appointed by the court to handle the aforesaid audit.
 4. Costs associated with the audit to be shared equally among the parties to the suit
 5. All parties to bear their own costs associated with the suit.
 6. Annual General meeting to be held and the court to determine the date.
 7. An independent person or entity be appointed by the court to preside over the Annual General Meeting.
 8. The aforesaid agreement be effected forthwith and the court to direct sequence of events.”
5. Subsequently and in furtherance of the terms of settlement agreements the court, in its ruling of 28th May 2020 appointed M/s Kinyori and Associates as the Auditors.
 6. In compliance with the 2nd term of agreement, the court in its ruling of 6th may 2021 set out the terms of reference for the Auditor thus:-
 - i. The audit to be conducted in a neutral venue
 - ii. The 4th Defendant to produce all documents relating to the shares and share holding, and also of its subsidiaries without any conditions and within ten (10) days from the date hereof.
 - iii. The auditor to acknowledge receipt of all documents availed for the audit by noting them in a counter book to be submitted to the court.
 - iv. To audit the list of share shareholders in the company, and the number of shares held per person since the company was incorporated to date, which includes the shares of person who are deceased if there are shares of deceased persons, the names of the beneficiaries to the deceased person’s estate.
 - v. To present information on how each shareholder, acquired their shares, where there has been any share transfer including joint shareholders.
 - vi. Investigate all paid up dividends and confirm whether the payments were made to genuine shareholders. Investigate if there are any outstanding payments of dividends, the amounts outstanding and the shareholders.
 - vii. The auditor to list all persons who are not shareholders to be summoned by the court to provide requisite information to the auditor.
 - viii. The Audit report to be presented to court in a sealed envelope within 45 days from the date hereof, any objections to the auditor’s report shall be raised within 14 days from the date of the report is presented in Court.
 - ix. Costs to be shared equally.



The plaintiff's case

7. It is the plaintiff's contention that the gist of the settlement agreement is the dissolution of the 4th Defendant and subsequent sharing of the assets to the genuine shareholders hence the need to protect and preserve the assets.
8. Further there has been no Election of directors since 2015 owing partly to the present suit. That the failure to elect directors is contrary to the provisions of Section 275 A of the *companies Act* of 2015 which requires every company to hold annual general meeting every year.
9. That the failure to hold elections since 2015 means that the 1st 2nd and 3rd Defendants hold office illegally.
10. The terms of reference no (viii) made on 6th May 2021 was to the effect that the audit report was to be filed in court within 45 days but it has not been done or presented to the court to date, hence the need for preservatory orders.
11. It is the plaintiff's contention that it is the 1st 2nd and 3rd Defendants who have frustrated the Auditor's work by their failure to co-operate.
12. That the settlement agreement which was adopted by the court has put the company in a situation analogous to a company under liquidation.
13. Reliance is placed on the case of Leisure Lodges limited Versus Yashvin A Shretta (1990) e KLR where it was hold:- " The date of commencement of winding up affects many matters, for example, the disposition of the company's property, transfer of shares, execution, the director's powers etc. The purpose of making the appointment of a provisional liquidator is to preserve the Company's assets and to prevent the directors from dissipating them before a winding up can be made."

The Defendants Case

14. The defendants contend that the prayers in the amended notice of motion dated 13th May 2022 have been conclusively dealt with by the court in its previous ruling.
15. That Mshila J. Made a ruling on 6/5/2021 and at paragraph 8 of the ruling, the Judge declined to allow a similar application by the plaintiff/applicants hence prayer no.8 is Res Judicata.
16. It is further contended that as can be gleaned from the adopted settlement agreement, the parties never intended the 4th Defendant to be barred from carrying on its normal operations.
17. That Urumwe Service Station is a legal entity which is not a party to this suit.
18. It is the Defendants view that the instant application is basically an attempt to re-open an already concluded matter as it raises the same issues that the plaintiff had raised in the plaint and which matter were dealt with by way of a settlement agreement which was filed and duly adopted as Judgment of the Court.



Analysis and Determination

Issues.

1. Whether the applicants have met the threshold for the grant of the orders sought in both applications.

15. A clear reading of the prayers sought, mostly hinges on how the 4th Defendant Umoja Service Station Limited should be managed.

Prayer (iii) and (iv) primarily seek orders in the nature of hiring and firing of company employees prayer no. (v) seeks the management of the 4th Defendants finances.

16. In the fairly old case *foss –Versus- Harbottle* (1843) 2 Hare 261 it was held:-..... “An elementary Principle is that a court does not interfere with the internal management of Companies acting within their powers.”
17. Further that, “Courts will interfere only where the act complained of, its ultra vires or is of a fraudulent character or not rectifiable by ordinary resolution. It is really very important to companies and to the economy of the Country in general that the court should not unless a very strong case is made out on the facts pleaded and proved or admitted take upon itself to interfere with the domestic forum which has been established for the management of the affairs of the company.
18. From the above, interference is allowable where it is proved that the acts complained of are ultra vires, are fraudulent and cannot be rectifiable by way of an ordinary resolution.
19. The 4th Defendant is a limited liability company managed by a Board of Directors.
20. Decisions made by a board of directors can be challenged after an audit has been done raising queries. This has to be through an Annual General meeting or a special meeting.
21. Prayer no. (vi) Seeks for orders that the former directors who were in office before the disputed elections of 27th November 2015 accept the 2nd Defendant Samuel Gichuhi and Caroline W. Kamau be allowed to serve as the only directors to manage and run the affairs of the company on an interim basis.
22. This particular prayer was among those found in the main plaint/suit. This suit was determined by way of a negotiated settlement agreed by both parties and which settlement agreement was adopted by the court as a Judgment of the court.
23. In the court of appeal case of *Board of Trustees National Social Security fund – Versus- Michael Mwalo* (2015) e KLR . It was held:- “ A court of law will not interfere with a consent Judgment except in circumstances such as would provide a good ground for varying or rescinding a contract between parties. To impeach a consent order or a consent Judgment it must be shown that it was obtained by fraud, collusion, or by an agreement contrary to the policy of court.”
24. In the case of *National Bank of Kenya LTD Versus Pipe Plastic Samko/it (K) Limited and Another* (2001) e KLR it was held:- “A court of Law Cannot re-write a contract, unless coercion, fraud, or undue influence are pleaded and proved.”
25. Prayer no (Vii) is in the alternative and seeks appropriate orders for the running of the company in the interest of the shareholders.



As argued supra parties had reached and agreed on a consent Judgment which was accordingly adopted by the court as such. There is a Judgment in place. The court cannot be asked to enter an alternative Judgment when the parties themselves have entered a consent settlement agreement.

26. This suit has already been concluded and I find no good reason to re-open it in the absence of proof of fraud undue influence and or coercion.
27. As regards prayer no (viii) which is for extension of the terms of reference for the auditor to include the period 2016 to 2021 both for the 4th defendant and its subsidiary Urumwa Service Station, at Paragraph 9 of the Court's ruling, it observed.

“The court having considered the affidavits and proposals at length and has taken note of the 1st plaintiffs proposal to include the preparation of financial statements in the auditors terms of reference. Even though it would be a big saving on time and resources if the preparation of the financial statement was to be included in the terms of reference, it is my considered view that it would be prudent to take one clause at a time and therefore finds the only substantive issue for determination is to set down the auditors terms of reference limited to an audit of the shareholders register, shareholding and dividends, the larger audit as envisaged by the 1st plaintiff will be done at a later date when giving effect to clause 6 of the medication settlement agreement which is premised on the holding of an Annual General Meeting.”

Section 7 of the *Civil Procedure Act* Provides

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties or between parties under whom they or any of them claim, litigating under the same title in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally decided by such court.”

28. On the issue of Res Judicata, the court in the case of Musan Kishay Kalala Paul in Vs – Director of Criminal Investigations and 4 others held:- We state the elements that must be proven before a court may arrive at the conclusion, that a matter is Res Judicata to be invoked in a civil matter, the following elements must be demonstrated:-
 - (a) There is a former Judgment or order which was final.
 - (b) The Judgment or order was on merit.
 - © The Judgment or order was rendered by a court having Jurisdiction over the subject matter and the parties and (d) there must be between the first and second action identical parties, subject matter and cause of action...”
29. I find the doctrine of Res Judicata is applicable in the present suit and in particular the orders sought in prayer No.8.
30. As regards prayer no (ix) it seeks orders for restraining the Defendants from paying dividends to the shareholders, renovations of the 4th Defendant properties as well as those of the sister company Urumwa service station.



31. This substantially goes to the management of the 4th Defendant and the court has made a finding that it is not bound to interfere with management of a company unless the acts complained of is Ultra vires, fraudulent in character or nor rectifiable by ordinary resolution.
32. As regards the notice of motion application dated 16th May 2022, the court in its Ruling had rendered itself on how the audit should carried. I find no good reason to interfere.

Conclusion

33. I find no merit on the two application and both are dismissed.
34. Costs in the cause.

RULING READ, SIGNED AND DELIVERED IN OPEN COURT AT NYERI THIS 19TH DAY OF OCTOBER, 2023.

**HON JUSTICE MARTIN MUYA
JUDGE**

