



**Gudka Westend Motors Limited v Kisii Bottlers Limited (Civil Case 525 of 2012) [2023] KEHC 23521 (KLR) (11 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 23521 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISII  
CIVIL CASE 525 OF 2012  
REA OUGO, J  
OCTOBER 11, 2023**

**BETWEEN**

**GUDKA WESTEND MOTORS LIMITED ..... PLAINTIFF**

**AND**

**KISII BOTTLERS LIMITED ..... DEFENDANT**

**JUDGMENT**

1. The plaintiff in its amended plaint dated 16<sup>th</sup> December 2020 seeks the following reliefs:
  - i. Declaration that the Plaintiff is a lawful and bona fide shareholder of the Defendant Company and thereby entitled to Notice and obliged to be consulted, prior to any undertaking that are bound and/or calculated to alter and/or affect the Macro-management of the Defendant Company.
  - ii. Declaration that the Merger and/or Amalgamation complained of, which was carried out entered into and/or undertaken without Notice to and involvement of the Plaintiff, thus ought to be set aside and/or varied as the affairs of the Defendant herein to revert to the position of obtaining ante and in particular, under the guidance of the shareholders, the Plaintiff not excepted.
  - iii. Declaration that the Defendant herein be ordered and/or directed to render accounts to the plaintiff herein and the other shareholders of the defendant company of the profits and/or losses realized and/or accrued during the period of the merger as well as (sic) the Dividends declared and/or paid out from the inception of the merger to date.
  - iv. Payments of *pro-rata* dividends to and in favour of the plaintiff, calculated on the plaintiff's shareholding portfolio computed on the basis of the current shares held on behalf of the plaintiff taking into account the share bonuses and rights issues, respectively.



- v. In the alternative and without prejudice to the foregoing, the Honourable Court be pleased to grant permission to and/or in favour of the plaintiff herein to engage a reputable forensic auditors, to audit and/or carry out inspection in respect of the operations, profits and/or losses, if any, arising from the operations of the Defendant, during the period of impugned merger and/or amalgamation of the report of the Forensic Auditor, be adopted by the court for purposes of determining dividends payable during the period 2012 to date.
  - vi. Declaration that the merger of the Defendant alongside M/s Rift Valley Bottlers and Mount Kenya Bottlers Limited, respectively, which was carried out without Notice to and/or involvement of the Plaintiff constituted gross violation of the Plaintiff's Economic Rights under the provisions of Article 40 (1) & (2) of the Constitution, 2010.
  - vii. Costs of the suit be borne by the Defendant.
  - viii. Any such further and/or other reliefs as the Honourable Court may deem fit and expedient so to grant.
2. According to the plaintiff, on 8<sup>th</sup> February 1995, Industrial & Commercial Development Corporation (ICDC) who was the major shareholder at the defendant offloaded 300,000 shares to the plaintiff. The shares represented 19.56% shareholding with the defendant company. The plaintiff paid Kshs 10,710,000/- which was received and acknowledged by ICDC on behalf of the defendant, however, the defendant failed to endorse and/or reflect the plaintiff's name in the company's register. The plaintiff contends that upon the purchase and execution of the Transfer Deed between the plaintiff and ICDC, it became a shareholder in the defendant company and is entitled to dividends and other periodical payments due and payable to shareholders. ICDC however failed to transfer the shares to the plaintiff and it filed a suit vide Kisii HCC No 234 of 1995, where it was decreed that the 300,000 shares be transferred and registered in favour of the plaintiff. Notwithstanding the Court's judgment, the defendant has failed to rectify the shareholder's register and recognize the plaintiff as a shareholder. However, the defendant has continued to pay annual dividends in favour of the plaintiff through ICDC.
  3. It was further pleaded that in September of 1995, the defendant company carried out share issues whereby the shareholders were entitled to on (1) ordinary shares for every 4 shares held with the Defendant. Consequently, the plaintiff together with other shareholders were entitled to share bonuses. After the purchase of 300,000 underwritten shares together with the attendant share issues and bonuses, the plaintiff accrued further shares in the defendant company and the plaintiff's shareholding capacity escalated to 8,136,703 shares (representing 49%).
  4. The Defendant without the knowledge of the plaintiff executed an arrangement where the defendant, M/s Rift Valley Bottlers and Mount Kenya Bottlers Limited became known as M/s Almasi Beverages Limited. Notwithstanding the merger, the legal identity of the defendant herein remained and thus the Defendant is still capable of being sued in its own name for its failure to endorse and reflect the plaintiff's name in the Defendant's shareholder's register. The merger of the defendant and M/s Rift Valley Bottlers and Mount Kenya Bottlers, was bound to affect the plaintiff's interest and in particular, the plaintiff's shareholding portfolio in the defendant company and incidental transmission of shares in favour of the new legal entity. The defendant was also required to give the plaintiff notice pertaining to any transaction whose effect would alter the general management and affairs of the defendant company, therefore the defendant acted contrary to Article 40 (1) & (2) of the Constitution. The plaintiff avers that the merger was carried out without the involvement of a major shareholder and is therefore unlawful and ought to be set aside. The defendant should also be directed to render accounts to the



plaintiff and other shareholders of the profits realized and dividends declared during the period of the merger. In the alternative, the court to direct that the plaintiff engages a reputable forensic auditor.

### **Defendant's Case**

5. The defendant filed their amended statement of defence dated 26<sup>th</sup> January 2021. It averred that ICDC is indeed the majority shareholder with 45.02% shares. The company Act 2015 gives existing shareholders the preemptory right to buy shares whenever they are on offer/sale. However, the defendant's other shareholders were not given an opportunity to exercise this power thus the alleged transfer of shares is invalid, if at all a transfer took place. In any event, it is the company's registrar who endorses the change of the shareholders in a company.
6. The plaintiff has also failed to avail documentary evidence to prove that indeed that it is a shareholder in the defendant. The defendant concedes that it was made aware of the transaction involving the plaintiff but it rejected the membership of the plaintiff as it was within its legal rights to do so. According to its records, the highest shareholder is ICDC with 45.02% of shares and the plaintiff cannot claim to have greater interest than it.
7. It further averred that it was not a party to the proceedings in Kisii HCC No 234 of 1995 M/s Gudka Westend Motors v M/s Industrial & Commercial Development Corp. The plaintiff did not become a shareholder in the defendant company. It acknowledged that it has been remitting dividends to ICDC as their records indicate that the plaintiff is a total stranger. They invited the court to consider the ruling by Hon. R.N Sitati on the notice of motion dated 15/11/2014 in which the court noted that there was no evidence that the transfer of the 300,000 shares had undergone a lawful process as espoused under the Company Act. The defendant pleads that it will suffer serious prejudice if the orders sought by the plaintiff granted for reasons that it will affect the right and liabilities of other shareholders affected by the proposed merger and interfere with the defendant's economic growth considering that the merger is to benefit the defendant to the tune of Kshs 2.5 billion. It was averred that private companies are exempted from interference and courts are only mandated to step in when there is evidence of fraud which have not been proved by the plaintiff in this instant suit. Further, dividends are only payable to shareholders and from 2012 to date the defendant has issued dividends to ICDC.

### **Rejoinder by the Plaintiff**

8. The plaintiff in a rejoinder avers that whether or not the defendant was a party or not to the suit Kisii HCC No 234 of 1995 it was bound by the final decree of the court unless the judgment has been set aside. They also contend that ruling delivered on 29/10/2014 pertaining to their notice of motion did not dispose of the suit. The amended statement of defence has also not been crafted as provided in the civil procedure and ought to be struck out.

### **Evidence by the Parties**

9. At the hearing, the plaintiff relied on the testimony of Ashwin Ramji Godka (Pw1) while the defendant relied on the evidence of Charles Chiuri (Dw1).
10. Pw1 testified that he is the managing director of the Plaintiff and by a resolution dated 3<sup>rd</sup> October 2012 he was allowed to prosecute the case. He adopted his witness statement dated 15<sup>th</sup> November 2012 as his evidence in chief. Pw1 through his letter dated 16/11/1994 asked the Defendant to sell him 800,000 shares. The defendant did not respond instead the letter was passed over to ICDC, one of the defendant's shareholders, who sold him 300,000 shares. The Defendants other Director was the executive director of ICDC, John Peter Nyangeri Simba. According to the Defendants annual returns in 1990 ICDC had 3,999,999 shares, ICDC Investment Limited had 100,000 shares, Rift



Valley Bottlers Limited had 50,000 and Development Finance Company Kenya Ltd had 200,000 shares; shares were sold to the shareholders by ICDC. The Annual returns of 1991 showed the total number of shares as 1,533,541 and the defendant had 38 new shareholders (ICDC sold shares to them). In 1992 the defendant's total shares were 1,533,541 and ICDC was still a shareholder with 943,928 shares. The number of shareholders had also increased.

11. Following the plaintiff's purchase of 300,000 shares from ICDC on a certificate of transfer of shares issued. The document was signed by ICDC and the said shares were in the Defendant company. Pw1 testified that the transaction was between a willing vendor and purchaser (the plaintiff). He however lodged a suit against ICDC in Kisii HCCC No 234 of 1995 against ICDC and the court held that the Plaintiff was the actual beneficial owner and ordered ICDC to work as trustees till the shares were effectively transferred and specifically perform the transaction.
12. Pw1 testified that ICDC in a letter dated 12<sup>th</sup> June 1996, advised the Defendant to comply with the judgment and enclosed a duly executed transfer deed transferring 300,000 shares to the Plaintiff but the Defendant did not act on the letter. He maintains that he received dividends from ICDC via a cheque on 23<sup>rd</sup> July 1998 and another of 390,000 through a letter dated 18<sup>th</sup> March 2010. Despite receiving the dividends, his name is yet to be included in the shareholding register of the Defendant. He testified that he was not informed of the merger between the Defendant, Rift Valley Bottlers and Mt. Kenya Bottlers to form Almasi Company Limited yet he is a shareholder. He filed HCCC Misc. App. 286 of 2012 at Kisii seeking to be admitted as a member of the Defendant Company but the case was dismissed on technicality.
13. On cross examination he testified that the court in Misc. 525 of 2012 held that the Plaintiff had failed to show that the transfer of the 300,000 went through the regular transactions requiring the sanctions of the shareholders. In Misc. 286 of 2012 the judge stated that the applicant was not diligent in buying shares from ICDC. He testified that he was not aware of pre-emptory rights of shareholders because usually existing members have preferential treatment in the sale of new shares. Pw1 does not have a certificate of transfer of shares but contends that by receiving dividends he is part of the company.
14. Charles Chiuri , Dw1, was the Chief Finance Officer of Almasi Beverages Ltd. He testified that on 16<sup>th</sup> November 1994, the Plaintiff through its Director sent a letter detailing their intention to acquire 800,000 shares from the defendant's company but the Defendant opted to reject the Plaintiffs request. The Defendant was not of the sale of 300,000 underwritten shares by Industrial & Commercial Development Corporation (ICDC) to the Plaintiff. ICDC never offered to sell their shares to the existing shareholders of the Defendant Company before attempting to offload the same to the Plaintiff who was a third party and therefore the alleged transfer of shares was invalid; the shareholders right of first refusal had been trampled upon. He testified that the Certificate of Transfer of Certain Marketable Securities executed by Charles Mkamba was meant to ascertain the value of shares being transferred as is provided under the Stamp Duty Act. Therefore, the plaintiff's reliance on the document as proof of a transfer instrument as opposed to a valid transfer deed was an exhibition of the Plaintiffs nihilism. Charles Mkamba was an employee of ICDC and the Certificate of Transfer of Certain Marketable Securities ought to have been executed by the defendants Auditors not ICDC hence its validity is questionable.
15. Dw1 also testified that the suit, Kisii HCCC No 234 of 1995, was instituted against ICDC and the court only directed ICDC to transfer shares allegedly bought by the Plaintiff to the Plaintiff as the defendant was not party to the suit. Therefore, effecting said order against the Defendant herein would be an overreach. The Plaintiff was not a member and/or shareholder of the Defendant Company and cannot seek orders mandating the Defendant to surrender its Books of Account or that the court engage a forensic Auditor. Without proof of shareholding, the Plaintiff cannot be declared a lawful and



bona fide shareholder. He testified that the Defendant was not at all privy to the special arrangement of the Plaintiff and ICDC for sharing dividends once its paid out to ICDC. The Plaintiff is not entitled to receive dividends in the Defendant Company.

16. Dw1 pointed out that the sale and/or transfer of shares could have only taken place with the sanction of the Defendant's Board of Directors and a resolution passed to that effect during the Defendants Annual or Special General Meetings. An order of specific performance would have been unnecessary if there had been a transfer. He urged the court to hold that the merger/and or amalgamation does not, shall not and will not affect the Plaintiff in its dealings. The merger was carried out with the full knowledge of every concerned party and in accordance with the legally set parameters and the Plaintiff was rightfully excluded.

### **Plaintiff's Submission**

17. The plaintiff in its submissions identified four issues to be considered by this court:
  - i. Whether the 300,000 underwritten shares in the Defendant Company legally belongs and/or were sold to the Plaintiff?
  - ii. Whether the plaintiff is entitled to be involved in the affairs of the defendant company by virtue of being a shareholder or otherwise?
  - iii. Whether the reliefs sought in the plaint are tenable in law and/or ought to be allowed as prayed?
  - iv. Who should bear the cost of the suit?
18. On the first issue, the plaintiff submits that it applied for 800,000 shares belonging to ICDC from the defendant company and ICDC sold 300,000 shares to it with the knowledge of the defendant. A certificate of transfer of certain marketable securities was duly executed by the auditor of ICDC confirming that the shares were transferred to the plaintiff. It heavily relied on the decision made by this court in Kisii HCCC No 234 of 1995. It submits that it was the pronouncement of the court that it is a beneficial owner of 300,000 underwritten shares held by ICDC at the Defendant Company. It contends that the decision by that court was not appealed against and neither was the judgment set aside. There was an agreement between the plaintiff and ICDC and that ICDC could not turn around on allegations that the sale and transfer did not follow the procedure of the Articles of Association. It relied on the case of *National Bank of Kenya Limited v Pipeplastic Samkolit (K) Limited & another* Nairobi CACA No 95 of 1999.
19. On the second issue, the plaintiff submits that a shareholder according to the Black's law dictionary is a person who owns shares of stock in a corporation or joint-stock company. The decree in Kisii HCCC No 234 of 1995 particularly the limb that requires that ICDC to transfer its 300,000 shares in the Defendant company to the Plaintiff deems the plaintiff a shareholder. In *Claire Adamba Okanga v Godfrey Gichuhi Waiharo* [2013] eKLR the court held that:

‘...court orders have to be obeyed if we are to uphold the rule of law and to obviate impunity and anarchy. Even if a party is aggrieved by a court order, he or she must still obey it’.
20. Finally on the third and forth issue, the plaintiff argues that by virtue of being a shareholder, the defendant was required to notify it of the undertakings of the company. However, it is only through the local daily newspaper that it learnt of the merger between the defendant and three other companies to create Almasi Beverages Limited. The actions of the defendant violated the plaintiff's economic rights enshrined in Article 40 (1) and (2) of the *Constitution*. It challenged the production of Dexh3 on account that it was produced in contravention of section 106 B of the *Evidence Act* and not certified as



per the requirements of section 81. It explained that the defendant was required to lodge a certificate of extraction in regards to the said evidence. It relied on the case of *Millitonic Mwendwa Kimanzi Kitute v Independent Electoral and Boundaries Commission & 2 others* [2017] eKLR.

### Defendant's Submissions

21. The defendant highlighted three issues in their submissions:
  - a. Whether the plaintiff is a bona fide shareholder in Kisii Bottlers Limited (Now Almasi Public Limited Company).
  - b. Whether the suit is time barred.
  - c. Whether the matter is *res judicata*.

#### a. Whether the plaintiff is a bona fide shareholder in Kisii Bottlers Limited (Now Almasi Public Limited Company).

22. The defendant submits that the purported transfer of shares was irregular as it was contrary to the defendant's Articles of Association and the *Companies Act* Cap 486 (Repealed) which have provisions for pre-emption rights and the right of first refusal. In the purported transaction involving the plaintiff, the existing shareholders were by passed and their rights completely disregarded. The defendant being a private company, had the discretion on whom to admit as a member/shareholder. Clause 15 (i) of the Defendant's Articles of Association state:

The Directors may refuse to register any transfer of a share

- (1) where the company has a lien on the share or
  - (2) where they are not satisfied that the proposed transferee is a responsible person
  - (3) where the Directors consider that the proposed transferee (not being a member) is not a desirable person to admit to membership...
23. In accordance with section 74 of the *Companies Act* Cap 486 (Repealed) the waiver or disapplication of the Defendant's shareholders right of first refusal would require assent by 75% of the shareholders vide a special resolution. The section reads as follows:

“Variation of Shareholder's Rights

75.

- (1) If in the case of a company, the share capital of which is divided into different classes of shares, provisions is made by the memorandum or articles for authorizing the variation of the rights attached to any class of shares in the company, subject to the consent of any specified proportion of the holders of the issued shares of that class or the sanction of a resolution passed at a separate meeting of the shareholders of those shares.”
24. The defendant submits that no special resolution was passed to exclude the operation of the defendant's shareholder right of first refusal. Therefore, the purported sale was frustrated for want of approval by the Defendant's Board of Directors as well as the pre-emptory rights of existing



shareholders being trampled on. The transfer was thus riddled with procedural flaws and thus could not be said to be valid.

25. It is further submitted that the plaintiff is desirous to enforce the judgment in HCCC No 234 of 1995 on specific performance, however the judgment therein was made on 3<sup>rd</sup> April 1996 and 25 years have since lapsed. Section 4 (4) of the Limitation of Actions Act provide that an action may not be brought upon a judgment after the end of 12 years from the date in which the judgment was delivered. The defendant in support of its argument cited the case of Koinange Investments and Development Company Limited v Ian Kabiu Ngethe & 3 others [2015] eKLR.
26. They also argue that the current suit is *res judicata* as the issues that are being canvassed in this case, that is, whether the plaintiff is a bona fide shareholder, was conclusively determined by Majanja J. in Civil Case No 37 'A' of 2008; Gudka Westend Motors Limited v Industrial & Commercial Development Corporation where the court stated that:

“The plaintiff failed to establish an intention that the shares purchased were to be held by ICDC in trust for it and that it was intended that the beneficial interest accruing from those shares including dividends would be paid to it. The totality of the facts is that the plaintiff and the defendant entered into an agreement for the sale of shares. The agreement was conditional on the Directors of Kisii Bottlers giving its consent to the purchase and subsequent registration of the plaintiff as a shareholder. Since the consent was refused, no shares were purchased and none were held in trust for the plaintiff. What the Plaintiff was entitled to was a refund of the purchase price. The right to refund could not in my view, morph into a trust for shares.”
27. They submit that the plaintiff is not a shareholder in the defendant and no evidence has been adduced in support of the same.

### **Analysis and Determination**

28. The main issue raised in this case is whether the plaintiff is a shareholder by virtue of the agreement between the plaintiff and ICDC. If so, whether it is entitled to the orders sought as against the defendant.
29. The plaintiff maintains that it acquired 300,000 shares in the defendant company from ICDC. It instituted a suit against ICDC in Kisii HCCC No 234 of 1995 and the court in its judgment directed that ICDC should transfer the 300,000 shares. The plaintiff and ICDC have since transferred the shares in favour of the plaintiff.
30. On the other hand, the defendant has maintained that the plaintiff is not a shareholder arguing that the purported transfer of shares was irregular as it was contrary to the defendant's Articles of Association and the Companies Act Cap 486 (Repealed) which have provisions for pre-emption rights and the right of first refusal.
31. Although the plaintiff argues that it is a shareholder and receives dividends from the defendant, there was no evidence that it received dividends from the defendant. The plaintiff produced cheques no. 142888 and 146176 issued by ICDC, the payments of dividends were not made by the defendant but by ICDC. Pw1 also produced the defendant's memorandum and article of association. Therefore, the plaintiff was aware that the directors at the defendant company could refuse to register the transfer of shares on account of any of the reasons listed under clause 15 (i) of the Defendant's Articles of Association. The defendant argued that it did not approve of the plaintiff's membership. Dw1 testified



that due process was not followed and that the transfer was unprocedural. Clause 15 (a) and (c) of the defendant's articles of association also provide as follows:

- “(a) A share may be transferred by a member or other person entitled to transfer to any member of the company selected by the transferor; but save as aforesaid and save as provided in sub-clause (b) hereof no share shall be transferred to a person who is not a member so long as any member or any person selected by the directors as one whom is desirable to admit to membership is willing to purchase the same at a fair value.
- (b) ...
- (c) Except where the transfer is made pursuant to sub-clause (2) and (b) hereof, the member proposing to transfer any shares shall give notice in writing to the company that he desires to transfer the same. Such notices shall specify the sum he or she gives as the fair value and shall constitute the company his or her agent for sale to any member of the company or person, selected as aforesaid at the price to be fixed by the auditor in accordance with these Articles...”

32. Dw1 also testified that the defendant did not receive any notice from ICDC of the sale of shares to the plaintiff and in any event, it rejected the membership of the plaintiff. The plaintiff was aware of the defendant's article of association and it was therefore required to ensure that the 300,000 shares were transferred in compliance with the express conditions in the defendant's articles of association. A new shareholder is required to carry out due diligence and know with exactitude the process necessary to be admitted to be a member of a company and this was echoed by the Court of Appeal in *Mwai Kibaki & another v Mathingira Wholesalers Company Limited & 6 others* [2018] eKLR where the court held as follows:

The Companies Law Cap 486 Laws of Kenya (repealed) and the Memorandum and Articles of Association of the 1st respondent had specific and definite procedure on how shares in the 1st respondent could pass from a member to another member or to a new member. Where, as here, such express conditions existed had to be complied with strictly. The evidence produced through the witnesses called by the 1st respondent which we have set out in this judgment was to the effect that new members (if they can be so called) heard about existence of a corporate body, the 1st respondent, and believed that that corporate body owned the suit premises and that, upon this belief, and without carrying out any due diligence on the 1st respondent they walked into the 1st respondent, allegedly bought shares and believed to have become shareholders and owners of the suit land. According to them they did not know that there was a process to be followed to acquire shares. The learned Judge was in error to accept that position as ignorance could not be tolerated in a serious issue like the matter before the trial court. It was incumbent on any new shareholder to carry out necessary due diligence and know with exactitude the process necessary to be admitted to be a member of the 1st respondent. Without that, and in the face of flagrant disregard of procedures set out, the “new” members did not acquire any rights in the 1st respondent that were known or could be recognized in law. [Emphasis added].

33. It was not enough that the plaintiff entered into an agreement with ICDC for the sale of the 300,000 shares. The plaintiff was required to show that ICDC gave notice to the defendant of the sale of 300,000 shares and thereafter, other members or any other person selected by the directors as desirable given an opportunity to buy the shares. It is only after 28 days lapse and the defendant fails to find a desirable



person or member to buy the shares, that ICDC could have sold them to the plaintiff. However, the directors of the defendant in clause 15(j) could still refuse registration of the share if it considered the plaintiff undesirable. The procedure for the transfer of shares outlined in the articles of association of the defendant was not followed. The plaintiff cannot therefore wave the judgment entered in respect of Kisii HCC No 234 of 1995 in which the defendant was not a party, and expect this court to turn a blind eye to the procedure on transfer of shares. The plaintiff was required to prove on a balance of probability that it complied with the procedures under the Company's Act Cap 486 (Repealed) and the Defendant's Memorandum and Articles of association in its quest to acquire shares at the defendant but there was no evidence led to this end.

34. In conclusion, the plaintiff having failed to prove that it followed the process laid down under the Company's Act Cap 486 (Repealed) and the Defendant's Memorandum and Articles of association. The plaintiff did not therefore acquire any rights in the defendant company and is therefore not entitled to the orders sought. Thus I need not make a finding on the 2<sup>nd</sup> and 3<sup>rd</sup> issues raised by the appellant. The suit is hereby dismissed and the defendant shall have the cost of the suit.

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 11<sup>TH</sup> DAY of OCTOBER 2023.**

**R.E. OUGO**

**JUDGE**

In the presence of:

Mr. Mulisa For the Plaintiff

Mr. Aloo For the Defendant

