



**Ruo v Muthaiga Travel Limited & 4 others (Civil Miscellaneous E698 of 2022)  
[2024] KEHC 14558 (KLR) (Commercial and Tax) (19 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 14558 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL MISCELLANEOUS E698 OF 2022**

**PM MULWA, J**

**NOVEMBER 19, 2024**

**BETWEEN**

**JOY WANJIKU RUO ..... APPLICANT**

**AND**

**MUTHAIGA TRAVEL LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**MILESTONE REGISTRARS ..... 2<sup>ND</sup> RESPONDENT**

**KLARISSA WILLS ..... 3<sup>RD</sup> RESPONDENT**

**MIRA HEMAL BID SHAH ..... 4<sup>TH</sup> RESPONDENT**

**FEMINA KHAN ..... 5<sup>TH</sup> RESPONDENT**

**RULING**

1. The Applicant filed the Notice of Motion dated 28<sup>th</sup> September 2022 under Sections 3, 780 & 782 of the Companies Act, 2015, Section 1A, 1B & 3A of the Civil Procedure Act, seeking a declaration that the 1<sup>st</sup> Respondent company’s affairs are being conducted in a manner that is oppressive and unfairly prejudicial to her. She is also seeking a declaration that the rights issue conducted at the Extra Ordinary General Meeting held on 13<sup>th</sup> September 2021 was oppressive and unfairly prejudicial to the interests of members generally. That the 1<sup>st</sup> Respondent or in the alternative the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents purchase the shares held by the Applicant.
2. The application is anchored on the grounds on its face and the annexed affidavit sworn by the Applicant on 28<sup>th</sup> September 2022. The grounds are that the Applicant is a shareholder of the 1<sup>st</sup> Respondent (the Company) holding 20,000 ordinary shares, the 2<sup>nd</sup> Respondent is the Company Secretary while the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents are shareholders of the Company.



3. The Applicant contended that the company's affairs are being conducted in a manner that is oppressive and unfairly prejudicial to her. At an extraordinary general meeting held on 13<sup>th</sup> September 2021, the 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> Respondents increased the Company's Share Capital by Kshs. 40,000,000, to be issued to the existing shareholders in proportion to their shareholding subject to payment. In effect, this caused the dilution of her shares by decreasing the value of shares.
4. The Applicant claimed that the notice of the extra ordinary general meeting contained insufficient information regarding the Share Capital increase and its justification. Despite her protest to the irregular increase of the Company's Share Capital, the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents proceeded to increase the share capital of the Company to her detriment.
5. The Applicant also claimed that she has previously offered her shares for sale to the Company and the Shareholders but the offers have been declined, ignored or undermined. She complained that there is continued mismanagement, unilateralism and concealment of the operations of the Company to her exclusion and detriment.
6. The Applicant again contended that from the agenda for the Annual General Meeting scheduled to take place on 30<sup>th</sup> September 2021, the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents intend to withhold dividends payable to members, while approving remuneration and bonuses for the 3<sup>rd</sup> and 4<sup>th</sup> Respondents and re-electing the 3<sup>rd</sup> Respondent back to the rotational directorship of the Company.
7. The Applicant further highlighted that part of the agenda items listed in the Notice for the Annual General Meeting scheduled to take place on 30<sup>th</sup> September 2022 is confirmation of minutes of the previous Annual General Meeting and receipt of audited financial statements for the year ended 31<sup>st</sup> March 2022 together with the Directors' and Auditors' reports. She claimed that this was contrary to the fact that there was no Annual General Meeting held in the year 2021 despite inquiry by the 5<sup>th</sup> Respondent; the financial statements of the year 2020 and 2021 have never been tabled for discussion and the financial statements shared with the Notice convening the Annual General Meeting fail to comply with section 651 of the *Companies Act*, 2015.

## Response

8. The Application is opposed through the Replying Affidavit sworn on 24<sup>th</sup> October 2022 by Vipinchandra Gulabchand Shah, the sole proprietor of Milestone Registrars, the 2<sup>nd</sup> Respondent.
9. The deponent denied the averments by the Applicant that the affairs of the Company are conducted in an oppressive and prejudicial manner and that the Applicant's offer to sell her shares was declined, ignored or undermined as alleged. He contended that this application is an attempt by the Applicant to force the Company to purchase her shares at a grossly exaggerated value.
10. The deponent highlighted that on 27<sup>th</sup> June 2019, the Applicant communicated her offer to sell her 20,000 shares in the Company for Kshs. 24,057,800/-. On 31<sup>st</sup> October 2019, the 3<sup>rd</sup> and 4<sup>th</sup> Respondents counteroffered to buy all the shares at Kshs. 7,500,000/-. The Applicant declined the counteroffer and the 3<sup>rd</sup> and 4<sup>th</sup> Respondents could not increase their offer as the Company had many bad debts and IATA had demanded a huge bank security that would require the shareholders of the Company to provide more funds.
11. The deponent also denied that the increase in the share capital diluted the Applicant's shareholding in the Company or that the increase was only aimed at decreasing the value her shareholding. He asserted that the reason for the increase in share capital was that the Company was required to provide a bank guarantee to IATA. A deposit of an amount similar to the bank guarantee had to be provided to the



bank in order for the bank to provide the guarantee and the Company did not have sufficient funds to provide the deposit.

12. The deponent further highlighted that through a letter dated 13<sup>th</sup> August 2021 addressed to all members, Milestone issued a notice of an extraordinary general meeting to be held at their office on 13<sup>th</sup> September 2021 at 10:00 am. The letter indicated that the agenda would include deliberating on and passing a resolution to increase the authorized nominal share capital of the company by Kshs. 40,000,000/-.
13. It was further deposed that at the said meeting, the reasons for increasing the share capital and to carry out a rights issue were discussed and the resolutions were put to a vote. The first vote, by way of a show of hands, was tied. A poll was subsequently conducted and the result was that 75% of the members were for the resolutions and 25% were against it. The resolutions passed by a majority and it was resolved that the share capital of the Company would be increased from Kshs. 10,000,000/- to Kshs. 50,000,000/- by the creation of 400,000 ordinary shares of Kshs. 100 each; a rights issue of four shares for every one share held be carried out; that such shares rank *pari passu* in all respects with the existing share capital of the Company and that invitations be sent out to all shareholders to subscribe to their right in their existing proportion.
14. The deponent indicated that through a letter dated 20<sup>th</sup> September, 2021 Milestone Registrars informed the applicant that upon the resolutions passed, she was now entitled to 80,000 shares of Kshs. 100 each amounting to Kshs. 8,000,000/-. She was requested to confirm whether she wants to take up her right by 27<sup>th</sup> September 2021 or it will be assumed that she does not want to take up her rights and the shares will be offered to other shareholders. The Applicant did not take up her right to 80,000 shares in the rights issue within the prescribed period. The shares held by the Applicant in the Company are valued at Kshs. 5,426,000/- as at 31<sup>st</sup> March 2022.
15. The deponent further denied that the Company's operations have been mismanaged and concealed from members of the Company. He indicated that he forwarded the 2020 and 2021 accounts through his email of 16<sup>th</sup> August 2021 and explained that the 2020 accounts had not been sent earlier due to an oversight. He asserted that the 2022 financial statements complied with the requirements of the [\*Companies Act, 2015\*](#).
16. The application was canvassed through written submissions which parties respectively filed.

### **Analysis and determination**

17. I have considered the application, the grounds, the supporting and replying affidavits as well as the submissions and authorities cited. The issue for determination is whether the company's affairs are being conducted in a manner that is oppressive and unfairly prejudicial to the Applicant and whether the Applicant is entitled to an order directing either the 1<sup>st</sup> Respondent or in the alternative the 3<sup>rd</sup> 4<sup>th</sup> and 5<sup>th</sup> Respondents purchase her shares.
18. The application is made under the provisions of section 780 of the [\*Companies Act, 2015\*](#) which provides as follows:
  1. A member of a company may apply to the Court by application for an order under section 782 on the ground—
    - 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 applicant); 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.”
19. The Court’s power to make orders for the protection of members against oppressive conduct and unfair prejudice is enshrined under Section 782 of the [Companies Act](#), as follows:
1. If, on the hearing of an application made in relation to a company under section 780 or 781, the Court finds the grounds on which the application is made to be substantiated, it may make such orders in respect of the company as it considers appropriate for giving relief in respect of the matters complained of.
  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 applicant has complained it has omitted to do;
    - c. 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;
    - d. require the company not to make any, or any specified, alterations in its articles without the leave of the Court;
    - e. 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.
  3. Subsection (2) does not limit the general effect of subsection (1).
  4. The company is entitled to be served with a copy of the application and to appear and be heard as respondent at the hearing of the application.”
20. The Court considered the meaning of oppressive and unfairly prejudicial conduct in [Velani & 6 others v Naran & 2 others \(Petition E002 of 2020\)](#) [2021] KEHC 75 (KLR) (Commercial and Tax) (21 September 2021) (Judgment), as follows:-
9. A reading of the above provision shows that the legislator left in the hands of the courts to determine what constitutes oppression, unfair prejudice, or conduct which unfairly disregards the interests of the applicant or an actual or omission which would be oppressive or so prejudicial. Oppression has been characterized as conduct which is burdensome, harsh and wrongful, or which lacks of probity and fair dealing. The reference to conduct that is “oppressive” or “unfairly prejudicial to the interests of the members generally or of some part of its members” in section 780 (1) (a) makes it clear that conduct affecting all members of a company equally may be unfairly prejudicial. There is no need for a petitioner to establish that he has been treated differently to other shareholders (albeit that this is a factor likely to strengthen his claim of unfair prejudice).
  10. Conduct which is “oppressive” or “unfairly prejudicial” must be shown for relief to be granted (although there is no need to show discrimination as well as unfair prejudice). The conduct complained of should at the lowest involve a visible departure from the standards of fair



dealing, and a violation of the conditions of fair play on which every shareholder who entrusts his money to a company is entitled to rely

11. There are two elements to the requirement of unfair prejudice, and both must be present to succeed in a claim: (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.
12. The test as to what amounts to unfair prejudice is objective. It is not necessary for the petitioning shareholder to show that anybody acted in bad faith or with the intention of causing prejudice. The courts will regard the prejudice as unfair if a hypothetical reasonable bystander would believe it to be unfair.  
  
Fairness is judged in the context of a commercial relationship, the contractual terms of which are, in the main, set out in the Articles of Association of the company and in any shareholders agreement. The starting point is therefore to ask whether the conduct of which the shareholder complains is in accordance with the Articles and the powers which the shareholders have entrusted to the board. The best protection for a shareholder is appropriate protection in the Articles themselves. Therefore, if the conduct is in accordance with the Articles, to which the shareholder has agreed, it will be more difficult to succeed with an unfair prejudice petition.
14. Even if the conduct is not in accordance with the Articles, it does not necessarily render the conduct unfair, as trivial or technical infringements of the Articles may not give rise to a remedy under section 780. For example, a member can clearly show prejudice if the economic value of his shares has significantly decreased or is put in jeopardy by the conduct of which the complaint is made.<sup>2</sup> However, prejudice justifying a Petition is not confined to such economic detriment, especially where it is established that one or more features of a quasi-partnership exist.<sup>2</sup>See *Re Brenfield Squash Racquets Club Limited* {1996} 2 BCLC 184.”
21. The circumstances of this case are that the Applicant resigned as a director of the company on 5<sup>th</sup> December 2022. On 27<sup>th</sup> June 2019, she offered to sell her 20,000 shares in the company for Kshs. 24,057,800/-. However, her offer was rejected by the 3<sup>rd</sup> and 4<sup>th</sup> Respondents who counteroffered to buy the shares for Kshs. 7,500,000/-. She subsequently declined the counteroffer and made another offer to sell them at Kshs. 24,000,000/- on 6<sup>th</sup> November 2019.
22. On 7<sup>th</sup> November 2019, the Applicant’s counteroffer was rejected because the Company faced many bad debts and IATA had demanded a huge bank security requiring the Company to provide more funds. On 12<sup>th</sup> September 2021, at the Company’s extraordinary meeting, the Company passed resolutions to increase that the share capital of the Company would be increased from Kshs. 10,000,000/- to Kshs. 50,000,000/- by the creation of 400,000 ordinary shares of Kshs. 100 each; a rights issue of four shares for every one share held be carried out; that such shares rank pari passu in all respects with the existing share capital of the Company and that invitations be sent out to all shareholders to subscribe to their right in their existing proportion.
23. The effect of these events was the dilution of the Applicant’s shares which is an example of unfair prejudice. From the chain of events, I am of the view that the passing of resolutions to increase the share capital of the company and to allow a rights issue soon after the Applicant had resigned as a director and offered to sell her shares amounts to unfair prejudice - See *Re Brenfield Squash Racquets Club Limited* [1996] 2 BCLC 184 and *Re Coloursource Ltd* [2004] EWHC 3078 (Ch).
24. The next issue is whether the Applicant is entitled to an order directing either the 1<sup>st</sup> Respondent or in the alternative the 3<sup>rd</sup> 4<sup>th</sup> and 5<sup>th</sup> Respondents to purchase her shares. According to the 2<sup>nd</sup> Respondent,



the shares held by the Applicant in the Company are valued at Kshs. 5,426,000/- as at 31<sup>st</sup> March, 2022. However, from their negotiation before the passing of the impugned resolutions, the 3<sup>rd</sup> and 4<sup>th</sup> Respondents were willing to pay the Applicant Kshs. 7,500,000/- for 20,000/- shares. I note that the Applicant declined the offer and was willing to take Kshs. 24,000,000/- on 6<sup>th</sup> November 2019. I also note that as at 20<sup>th</sup> September 2021, Milestone Registrars informed the Applicant that upon the resolutions passed, she was now entitled to 80,000 shares of Kshs. 100 each amounting to Kshs. 8,000,000/-.

25. Accordingly, the application dated 28<sup>th</sup> September 2022 succeeds in the following terms:
- i. The dilution of the Applicant's shares amounted to unfair prejudice. From the chain of events, it is evident that the passing of resolutions to increase the share capital of the company and to allow a rights issue soon after the Applicant had resigned as a director and offered to sell her shares amounted to unfair prejudice.
  - ii. That the 1<sup>st</sup> Respondent or in the alternative the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents purchase the shares held by the Applicant for Kshs. 8,000,000/-.
  - iii. Costs are awarded to the Applicant.

**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 19<sup>TH</sup> DAY OF NOVEMBER 2024.**

.....  
**P. MULWA**

**JUDGE**

In the presence of:

Mr. Biko Angwenyi for applicant

Ms. Sirawa h/b for Mr. Makori for 1<sup>st</sup> – 4<sup>th</sup> respondents

Court Assistant: Carlos

