



**Sanjiv v Ghelani Enterprises Limited & 2 others (Civil Suit 416 of 2017)
[2021] KEHC 83 (KLR) (Commercial and Tax) (16 September 2021) (Judgment)**

Neutral citation: [2021] KEHC 83 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT 416 OF 2017
MW MUIGAI, J
SEPTEMBER 16, 2021**

BETWEEN

JAYSHREE SUCHAK SANJIV PLAINTIFF

AND

GHELANI ENTERPRISES LIMITED 1ST DEFENDANT

ELESH GHELANI NATRAWAL 2ND DEFENDANT

GHELANI METALS LIMITED 3RD DEFENDANT

JUDGMENT

PLAINTIFF'S CASE

1. The Plaintiff filed a Complaint dated 3rd October 2017 and filed on 9th October 2017. The Plaintiff and 2nd Defendant are Directors of 1st Defendant Company at 50% each of shares. The 1st Defendant Company is Director & Shareholder of 3rd Defendant Company. The Plaintiff's claim is that in 2003 with 2nd Defendant they formed 1st Defendant & 3rd Defendant Company. In 2016, the 2nd Defendant excluded the Plaintiff from management of the 3rd Defendant Company and withheld information. The 2nd Defendant gave the Plaintiff a Final Settlement Agreement (FSA) that offered the Plaintiff legal ownership of LR 209/8536/4 owned by 3rd Defendant Company in exchange for transfer of 5000 shares held in Tononoka Fireworks Ltd. Clause 8 of the FSA stipulated that if the Plaintiff refused the settlement offer then the Plaintiff would be evicted to vacate No 11 Muthaiga Court, 6th Avenue Nairobi.
2. The Plaintiff's other claim was that on or about the year 2012, the 2nd Defendant failed to adhere to the provisions of Article 5 of the 3rd Defendant's Article of Association by purporting to allot 900 unissued shares to himself without the consent or approval of the 1st Defendant in whom the Plaintiff



is a Director and Shareholder. In a bid to rectify this anomaly, the 2nd Defendant offered the Plaintiff 450 shares which the Plaintiff ultimately rejected and insisted that the anomaly should be rectified.

3. The Plaintiff further averred that search results obtained by the Plaintiff revealed that the 2nd Defendant had unilaterally and fraudulently allocated himself 900 shares in the 3rd Defendant and subsequently fraudulently altered the 3rd Defendant's records.
4. That the 3rd Defendant stands to lose all the assets that it owns to the 2nd Defendant and the Plaintiff is apprehensive that in connivance with the Company Secretary, the 2nd Defendant is capable of wheeling out all of the 3rd Defendant's assets particularly 2 parcels of land situate in Nairobi Area.
5. The Plaintiff prayed for judgment; -
 - a. A declaration that the transfer of 900 shares in the 3rd Defendant to the 2nd Defendant by the 2nd Defendant was unlawful and contrary to the 3rd Defendant's Articles of Association hence null and void.
 - b. The Registrar of companies be and is hereby directed to rectify the 3rd Defendant's record by cancelling the unlawful transfer of 900 shares to the 2nd Defendant.
 - c. Cost of the suit.

DEFENCE

6. 1st Defendant filed a Statement of Defense dated 4th December 2017. The 1st Defendant denied the averments in the Plaintiff and stated that it's a dormant company which did not trade in any business whatsoever and has never opened or operated any bank account.
7. Further, the 1st Defendant stated that on 31st December 2013, the Plaintiff vide email to the 2nd Defendant resigned from directorship in the 1st Defendant. The 1st Defendant holds 91 shares in the 3rd Defendant while the 2nd Defendant holds 909 shares making the 2nd Defendant the majority shareholder in the 3rd Defendant.
8. The 2nd Defendant filed a defense dated 4th November 2017. The Defendant denied the allegations contained in the Plaintiff and stated that the Plaintiff started out as an employee of the 3rd Defendant company and Tononoka Fireworks Limited (TFL) and the Plaintiff's role was to be a purely nominal one.
9. Further, the 3rd Defendant is a dormant holding company which has since its incorporation made any significant transaction in any financial year and does not operate any bank account.
10. The Defendant also stated that the Plaintiff sent an email expressing her resignation from the 1st Defendant company and TFL with effect from 1st January 2014 out of free will and thereby holding claims against the 1st Defendant and TFL. The Defendant accepted the Plaintiff's said resignation and indicated that the Plaintiff's name shall be removed as a shareholder and employee of the 1st Defendant and TFL.
11. In addition, the Defendant averred that before the said changes could be effected, the Plaintiff in breach of her fiduciary duties incorporated a rival company to TFL known as Jays Pyrotechnics Limited (JPL) involved in exactly the same business as TFL.
12. The 2nd Defendant acting in the interest of TFL, the 1st and 3rd Defendant companies, resolved to settle the rivalry business by way of a Final Parting Settlement Agreement (FPS). The Plaintiff accepted and signed the FPS dated 31st October 2016 and was therefore legally binding between the parties and the



Plaintiff is estopped from denying the contents of the FPS. The Plaintiff breached the terms of the FPS, the 2nd Defendant invoked Clause 8 of the FPS and demanded a vacant possession of the property on 3rd March 2017 opposing the Plaintiff's allegations of unlawful eviction threats.

13. The 3rd Defendant filed a Notice of Preliminary Objection on the grounds: that the Plaintiff is not a member of the 3rd Defendant within the meaning of Section 780 of the *Companies Act* and therefore lacks *locus standi* to institute the suit against the 3rd Defendant; and that vide a ruling dated 9th June 2017, the Court in HCCC No. 102 of 2017 Ghelani Metals & Others vs Elesh Ghelani Natwarlal & Another made a finding to this effect.

PLAINTIFF'S SUBMISSIONS

14. The Plaintiff submitted that the allotment of the 900 shares to the 2nd Defendant was unlawful for the reason that the allotment was contrary to Article 5 of the Articles of Association which bind the shareholders and the company.
15. It was the Plaintiff's submission that whereas there was no resolution passed for the allotment of the 900 shares, the allotment was not ratified at a later meeting of the shareholders/directors of the 3rd Defendant. The allotment as void *ab initio* and as such it was a nullity in law and the disguised ratification was equally invalid and void *ab initio*.
16. The Plaintiff urged the Court to find that the allotment of the shares and the attempted ratification contravened the Articles of Association as well as the provisions of the *Companies Act*. Further, the Plaintiff submitted that the Court has jurisdiction to make the orders sought and remedy the default pursuant to Sections 863 and 864 of the *Companies Act*. The acts complained of by the Plaintiff constitute an illegality and having filed a defense the 2nd Defendant submitted himself to the jurisdiction of the Court.
17. The Plaintiff urged the Court to be guided by the decision of *Guo Dong versus Multi Win Trading (E.A) Company Ltd & 6 Others* [2015] eKLR where it was held as follows regarding the rectification of the register under the provisions of Section 118 of the *Companies Act* (Repealed) now Section 103 of the *Companies Act* 2015.

“The court's finding is that; rectification is a remedy whereby a court orders a change in a written document to reflect what it ought to have said in the first place. However, this is limited to the membership of the company and it would appear not to extend to directors, advocates and company secretary who by every definition are not the members of the company, but are merely its agents.

DETERMINATION

18. The Court record confirms that on 18th July 2019, Mr Mureithi for the Plaintiff, Mr Mbarak for 2nd Defendant and Mr Githinji for 1st & 3rd Defendants attended Court and outlined the various pending Applications.
 - a. The Application by Counsel for 2nd Defendant to cease acting was granted subject to service through substituted service directly to 2nd Defendant.
 - b. The Application by 1st & 3rd Defendants to cease acting was granted subject to service through substituted service directly to 1st & 3rd Defendants.



19. On 5th December 2019, the Plaintiff's advocate was present and confirmed absence of the Defendants. The Court granted orders that the Defendants were served directly to attend Case Management Conference (CMC) after obtaining alternative legal representation.
20. On 18th February 2020, the Plaintiff's advocate was present, and confirmed service to the Defendants as shown by Affidavit of Service of 17th February 2020 and filed Case Management Check List and were ready to take hearing date. The Hearing was scheduled on 18th March 2020 but the Court was not sitting and away on official duties.
21. The matter was scheduled for hearing on 18th November 2020, 17th March 2021, 18th May 2021, whereas all these dates the Court ordered the Defendants to be served and the Plaintiff's advocate confirmed service of the hearing on 18th May 2021 and sought early hearing as the Plaintiff was scheduled to travel abroad.
22. The pleadings by the parties and the Plaintiff's submissions filed by the parties have been considered. The Defendant entered appearance, filed Defense but did not participate in the hearing.
23. On 19th May 2021 the matter came up for hearing of the Plaintiff's case. The Plaintiff testified as PW1 and there was no appearance by the Defendants during the hearing thus, the Defendants did not testify or cross examine the Plaintiff. The Counsel representing the Defendants had filed Applications to cease acting for the Defendants for the reasons that: the 2nd Defendant withdrew instructions from the firm of Mbarak Law LLP; and the 1st & 3rd Defendants had not communicated to the Advocates for almost a year and could not be located at the company's officials or agents at their last known address.
24. PW1 relied on her witness statement which marked the close of the Plaintiff's case and sought orders as prayed in the Plaintiff.
25. The 2nd Defendant in its pleadings based its Defence on the fact that the Plaintiff had tendered its resignation from the 1st Defendant. Looking at the Plaintiff's bundle of Documents there is a letter dated 31st October 2016 addressed to the Company Secretary of Ghelani Enterprises Limited where the Plaintiff resigned as the Director and stated as follows;

I hereby tender my resignation as a Director of Ghelani Enterprises Limited with effect from 31st October 2016. Kindly amend your records accordingly.

26. Pages 1-16 of the Bundle of the Plaintiff's documents, the 1st Defendant's Memorandum and Articles of Association indicate that the Plaintiff and the 2nd Defendant were the only directors and shareholders of the 1st Defendant. In my view the fact that the Plaintiff tendered her resignation as the Director of the 1st Defendant does not mean that the Plaintiff was no longer a shareholder of the 1st Defendant. There was therefore no basis for the 2nd Defendant to remove the Plaintiff as the shareholder of the 1st Defendant Company. There is no evidence that the resignation was accepted and/or purchase of shares followed the Memorandum & Articles of Association of the Company.
27. Contrary to the averments of the 2nd Defendant that the Plaintiff is not a member of the 3rd Defendant within the meaning of Section 780 of the Companies Act and therefore lacks *locus standi* to institute the suit against the 3rd Defendant. Section 780 of the Companies Act provides; -
Application to Court by company member for order under section 796
 - (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.
- (2) In this section, "member", in relation to a company, includes a person who is not a member of the company but is a person to whom shares of the company—
- (a) have been transferred; or
 - (b) have been transmitted by operation of law.
28. The ruling dated 9th June 2017, the Court in HCCC No. 102 of 2017 Ghelani Metals & Others vs Elesh Ghelani Natwarlal & Another on 9th June 2017, the Trial Court Hon L Onguto J found:
- “The 4th Plaintiff is certainly within her rights to complain that the Defendant is acting oppressively. It may be stated that the Defendant's acts are unfairly prejudicial to the members of GML, GEL and TFL, including the 4th Plaintiff who legitimately expects to be treated better. She would be entitled to seek relief and also intervene on behalf of GEL where she is a shareholder and which in turn is a member of GML. (emphasis mine). The 4th Plaintiff has a remedy under statute, in my view, in the circumstances of this case.”
29. Does the Plaintiff have *locus standi* to institute these proceedings? The law that provides the answer to the Plaintiff's question was stated in the case of ***Dadan versus Manji & 3 Others***, (2004) 1 KLR as follows:
- “...if due to an illegality a shareholder perceives that the company is put to loss and damage but cannot bring an action for relief in its own name, such a shareholder can bring an action by way of a derivative suit.”
30. In these circumstances, the Plaintiff herein could not bring an action by way of a derivative suit but instead brought an action for relief in her own name and as earlier on stated the Plaintiff is a shareholder of the 1st Defendant and which in turn is a member of the 3rd Defendant the import of which is that the Plaintiff has *locus standi* to institute the present suit.
31. It is not in dispute that 900 shares in the 3rd Defendant were transferred to the 2nd Defendant by the 2nd Defendant. What is in dispute is the manner in which the said 900 shares were transferred. The Plaintiff averred that it was unlawful and contrary to the 3rd Defendant's Articles of Association hence null and void.
32. The 2nd Defendant purportedly transferred the 3rd Defendant's 900 unissued shares to himself and the Plaintiff on the other hand this could only be done with the participation of both the 2nd Defendant and the Plaintiff through resolutions executed by both of them as representatives of the 1st Defendant. As already established, Plaintiff by virtue of being a shareholder in the 1st Defendant is a member of the 3rd Defendant.
33. On Page 132 of the Plaintiff's bundle of documents, there was an extra ordinary general meeting held on 4th July 2016 where the 2nd Defendant sought to ratify the allotment of the 900 unissued shares in the 3rd Defendant to himself. The minutes of the said meeting were signed by the 2nd Defendant and there was no other representative of the 1st Defendant in the meeting other than the 2nd Defendant himself.



34. The Articles of Association of the 3rd Defendant provide;

no business shall be transacted at any general meeting unless a quorum of 2 members is present at the time when the meeting proceeds to business and a resolution in writing signed by all 2 members for the time being entitled to receive notice of and to attend and vote at any General Meeting shall be as valid and effective as if the same had been passed at a General Meeting of the company duly convened and held.

35. By virtue of this provision of the Articles of Association of the 3rd Defendant, there was no quorum on the meeting held on 4th July 2016. Therefore, the ratification of the allotment of 900 ordinary shares is null and void.

36. The Plaintiff prays that the Registrar of companies be directed to rectify the 3rd Defendant's record by cancelling the unlawful transfer of 900 shares to the 2nd Defendant. In the case of *Guo Dong v Multi Win Trading (E.A) Company Ltd & 6 others* [2015] eKLR supra

The court's view is that, such changes are the sole preserve of the company according to its Articles and Memorandum of Association. The said view is fortified by Halsbury's Laws of England, (4th Edn.), Vol. 7(1) paragraph 372 where the learned authors were quite categorical concerning the court's jurisdiction in rectification. The same can only apply to a company's share register. The learned authors note as follows;

“372. General jurisdiction to rectify company's register of members

The jurisdiction to rectify a company's register of members is discretionary; and it is not limited by the provisions of the *Companies Act* 2006. Thus the court will rectify the register, apart from that Act, to enable the members of a company to have a fair and reasonable exercise of their rights.

When the court entertains the application, it is bound to go into all the circumstances of the case, and to consider what equity the applicant has to call for its interposition and the purpose for which relief is sought.

The power to rectify has been exercised where there has been misrepresentation in the prospectus; where it is expedient to have an order which will bind all the shareholders and effectually bar any subsequent application for restoration of a name struck out by the directors; where shares have been illegally allotted at a discount; where the application for shares has been made in the name of a person, as, for example, an underwriter, without his authority; where there is no valid allotment of shares; or the allotment is not made within a reasonable time, or is irregular; where a transfer of shares has been improperly registered or registration has been refused; where there are joint holders of shares who wish to divide the shares so held into two parts with their names entered in the register in respect of each part in a different order; where the company puts on its register matters which are not required by the statute; in order to set right allotments of shares which have been issued as fully paid without a proper contract being filed; and where an overseas company was entered in the register without the permission of the Treasury, which was at the time required.”

From the above, it is this court finding that the court has the power to rectify under section 118 of the *companies act* but can only do so with respect to the shares of the company or issues with regard to membership.”



37. Even if the Plaintiff as per the Ruling of 9th June 2017 referenced above, the Trial Court denied to grant right to sue through derivative action as it was not in the best interest of the 3rd Defendant company and because there were other remedies available to the plaintiff for redress file claim under Section 780 of Companies Act, The Trial Court made a finding on illegally allotted shares at GML Co as follows;

I have no doubt that until disposed of through an authorized allotment, shares form part of the assets of the Company. There is no doubt that Directors of private Companies not only control the process of share transfer but also have the power to deal with and allot unissued shares. The allotment must however not be whimsical but pursuant to legal provisions “Mem Art” of the Company. Where an allotment of shares is undertaken contrary to provisions of law, the Director [is] would actually be in breach of duty..... on the affidavit evidence before me, am not satisfied that there was a properly convened meeting of 4th July 2016 which ratified the allotment of 900 shares in GML to the [2nd] Defendant.

38. Even if these proceedings the plaintiff lacks *locus standi*, the very same cited Ruling already made a legal finding. The issue was determined by a Court of equal, concurrent and competent jurisdiction to this Court until successfully appealed against, these findings remain legal, valid and regular orders of the Court.

39. To the 3rd Defendant’s Preliminary Objection of 4th December 2017, that the plaintiff is not a member of 3rd Defendant within the meaning of Section 780 of Companies Act 2015 and lacks *locus standi* to institute the suit against the 3rd Defendant as per the Ruling of 9th June 2017 is moot as the Plaintiff did not pursue under Section 780 application as an alternative remedy but sought declaration under the Plaintiff which has not been struck off despite a pending unprosecuted application that the allotment of 900 shares was illegal. The 3rd Defendant raised the issue that the matter ought to proceed for arbitration vide Clause 32 of the ‘MeM Art’ of the Company. The Court record confirms that the parties failed to comply with **Section 6 of Arbitration Act** and submitted and acquiesced to the Court’s jurisdiction and filed pleadings and participated in the proceedings that culminated with the Ruling of 9th June 2017.

40. The Plaintiff has proved her case against the 2nd Defendant that he illegally transferred the shares of the 3rd Defendant to himself. The court grants prayers 1 and 2 of the Plaintiff dated 3rd October 2017 together with the costs of the suit which will be borne by the 1st to 3rd Defendants.

DISPOSITION

1. The Plaintiff’s prayers in the plaintiff are granted with Costs.
2. The Preliminary objection is dismissed.

DELIVERED SIGNED & DATED IN OPEN COURT ON 16TH SEPTEMBER, 2021. (VIRTUAL CONFERENCE DUE TO CORVID 19 PANDEMIC MEASURES RESTRICTING OPEN COURT OPERATIONS AS PER CHIEF JUSTICE DIRECTIONS OF 17TH APRIL 2020)

M.W. MUIGAI

JUDGE

MS MWIHAKI FOR PLAINTIFF-PRESENT

DEFENDANTS-N/A

COURT CLERK TUPET

