



**Velani & 6 others v Naran & 2 others (Petition E002 of 2020)
[2021] KEHC 75 (KLR) (Commercial and Tax) (21 September 2021) (Judgment)**

Neutral citation: [2021] KEHC 75 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
PETITION E002 OF 2020
JM MATIVO, J
SEPTEMBER 21, 2021**

BETWEEN

**MAVJI VELANI 1ST PETITIONER
LAXMIBEN MAVJI VELANI 2ND PETITIONER
BHANENDRA KUMAR BAGDA 3RD PETITIONER
AMITA BAGDA 4TH PETITIONER
HIMESHKUMAR JAYANTIBHAI PATEL 5TH PETITIONER
JAYESHKUMAR JAYANTIBHAI PATEL 6TH PETITIONER
SAMJI HIRJI RAJANI 7TH PETITIONER**

AND

**PINDORIA KANTABEN NARAN 1ST RESPONDENT
YAMINI BUILDERS COMPANY LIMITED 2ND RESPONDENT
NDEY VILLAS MANAGEMENT LIMITED 3RD RESPONDENT**

JUDGMENT

1. Vide an amended Petition dated 28th April 2021, Mavji Velani, Laxmiben Mavji Velani, Bhanendra Kumar Bagda, Amita Bagda, Himeshkumar Jayantibhai Patel, Jayeshkumar Jayantibhai patel, and Samji Hirji Rajani (the Petitioners) petitioned this court seeking the following orders against the Respondents: -
 - a. A declaration that the 1st and 2nd Respondents actions are oppressive and/ or are unfairly prejudicial to the interests of the Petitioners.



- b. A declaration that the 1st and 2nd Respondents relinquish their rights as shareholders/directors of the 3rd Respondent Ndey Villas Management Limited.
 - c. That the court be pleased to direct the Registrar of Companies to delete the names of the 1st and 2nd Respondents as shareholders of the 3rd Respondent Ndey Villas Management Limited, and in their place add the 1st and 2nd Petitioners as shareholders.
 - d. That thereafter the 1st and 2nd Petitioners be directed to allot shares to all the Petitioners as provided for under the terms of the leases giving ownership of the property to the Petitioners.
 - e. That this court do issue such further orders and give such directions as it may deem fit to meet the ends of justice and the protection of the Petitioners' rights in the context of the declarations made.
 - f. That the costs of the Petition be awarded to the Petitioners as against the Respondents.
2. The Petitioners case is that they purchased properties from the 1st Respondent erected on LR. No. 1870/1/175 (IR 103249/1) and the sub leases for their respective units were transferred in their favour. They also aver that a management company known as Ndey Villas Management Limited was incorporated with the object of acquiring the reversionary lease and also managing the estate comprising of the sad units known as Ndey Villas.
 3. The Petitioners also state 1st and 2nd Respondent were registered as the initial subscribers of the company upon its incorporation on 19th May 2011. The Petitioners also state that the 1st Respondent issued them with leases on condition that the 1st Respondent would simultaneously with signing the leases apply for membership in the 3rd Respondent and that the shares in the 3rd Respondent would be an inseparable part of the leases. The Petitioners state that despite all the four units having been transferred to the Petitioners, the 1st and 2nd Respondents have failed to transfer the reversionary interest to the 3rd Respondent or release the mother title to the Petitioners. Additionally, the Petitioners state that despite being issued with share certificates as the beneficial shareholders, the actual changes are yet to be effected at the companies registry.
 4. As a consequence of the foregoing, they state that they are unable to conduct the affairs of the company since the record at the Registrar of Companies does not reflect them as shareholders. Further, they state that the 1st and 2nd Respondents have not conducted the affairs of the 3rd Respondent and they became inactive upon selling the units to the Petitioners. Also, they state that they have requested the 1st and 2nd Respondents to relinquish their positions as shareholders/director in the company to them but they have refused thereby necessitating this Petition.
 5. They aver that since the shares so far taken up in the 3rd Respondent are two, it is only proper that they first be registered in the name of two of the Petitioners who will then transfer them to the other Petitioners based on the ownership of the houses.
 6. The Petition is premised on the supporting affidavit of Mavji Velani, the 1st Petitioner dated 28th April 2021 which expounds the grounds cited in the Petition, hence it will serve no useful purpose to rehash the contents here. It will suffice to state that the Petition was canvassed by way of affidavit evidence and written submissions and despite being served, the Respondents never filed any Response to the Petition nor did they participate in the proceedings.



7. The Petitioner’s counsel rehashed the facts giving rise to the case and citing sections 780 and 782 of the *Companies Act*¹ (the Act) argued that the said provisions empower this court to grant the orders sought and urged the court to allow the Petition as prayed.
8. A useful starting point is to examine the applicable legal framework. In this regard, Part XXIX of the Act is entitled Protection of Members Against Oppressive Conduct and Unfair Prejudice. Section 780 provides as follows: -
 780. 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.
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

¹ Act No. 17 of 2015.



courts will regard the prejudice as unfair if a hypothetical reasonable bystander would believe it to be unfair.

13. 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.² 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.
15. The conduct must be unfairly prejudicial to the Petitioner's interests in his capacity as a member of the Company (i.e. as a shareholder), but the court takes a broad view of what might be regarded as his interests as a member of the Company. The words "oppressive" or "unfairly" enables the court to consider wider equitable considerations and recognizes that the members have rights and expectations which are not necessarily included in the Articles of Association. For example, a member's interest may arise out of an agreement that some or all members should participate in the management of the Company. A member's interest is not, therefore, limited to his strict legal rights, but can extend to legitimate expectations arising from the nature of the Company and agreements and understandings between the parties.
16. Where such expectations exist, a Petitioner must in general show some abuse by the directors of their powers, or an infringement of the member's strict legal rights under the Company's constitution. Unfair prejudice is a flexible concept, and incapable of exhaustive definition. The categories of conduct which may amount to unfairly prejudicial conduct are not closed. However, common examples of what may constitute unfairly prejudicial conduct are: -
 - a) exclusion from management in circumstances where there is a (legitimate) expectation of participation;
 - b) the diversion of business to another company in which the majority shareholder holds an interest;
 - c) the awarding by the majority shareholder to himself of excessive financial benefits; and
 - d) abuses of power and breaches of the Articles of Association. For example, the passing of a special resolution to alter the Company's Articles may be unfairly prejudicial conduct if such alterations would affect the Petitioner's legitimate expectation that he would participate in the management of the Company. Also, repeated failures to hold AGMs; delaying accounts, and depriving the members of their right to know the state of the Company's affairs may all be unfairly prejudicial to a member's interests.

² See *Re Brenfield Squash Racquets Club Limited* {1996} 2 BCLC 184).



17. In the Canadian case of *Westfair Foods Ltd v Watt*,³ Kerrans JA expressed the opinion that the oppression remedy provisions are nothing more than a compendious way for Parliament saying to the courts that the classes protected by the Act are to be fairly and justly treated. This is important because, in traditional company law theory, fairness and justice are to be judged by what is expressed in the articles which are indeed stated to be contracts. Put differently, in classical company law fairness and justice reside in the legal rights which accrue under the statutory contract.
18. The task of determining whether or not there has been commercial unfairness must be considered in the context of the particular relationship in issue, which will not infrequently involve a balancing exercise between competing considerations, including examination of the conduct of the applicant. As was observed in *Re London School of Electronics Ltd*:⁴
19. In summary, the authorities make it clear that the court must carefully consider the conduct of both applicant(s) and respondent(s) before making any determination about first, whether the section has been contravened and, secondly, if so, whether, and what, relief ought to be granted. The court will also look at whether the reasonable expectations of the member/s have been breached. Breaches of reasonable expectations include exclusion from management of the company; Lack of information being provided by the directors to the member; and attempts to force the member to sell their shares only to mention but some.
20. The remedy for oppression and unfair prejudicial conduct is available, not to vindicate legal rights, but to vindicate equity and justice and as such is to be viewed as an equitable remedy. I have carefully weighed the facts and circumstances of this case. I have applied the law and tests laid down in judicial pronouncements to the facts. I find no difficulty concluding that the Petitioners have demonstrated that the 1st and 2nd Respondents have not only abused their powers but also their actions are ultra vires the company's Articles of Association. Consequently, it is my finding that the Petitioners have demonstrated that the 3rd Respondent's affairs are being or have been conducted in a manner that is oppressive or is unfairly prejudicial to the interests of the members generally or of some part of its members (including the Petitioners); and or the said acts or omissions are oppressive and prejudicial to the Petitioners. Further, the Petitioners have proved actual breach of terms that have been agreed as to how the Company would be run, and that the manner in which the 1st Respondent is conducting himself offends equitable considerations.
21. Section 782 of the Act provides for the power of the court to make orders for protection of members against oppressive conduct and unfair prejudice. It provides 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.

³ (1991) 5 BLR (2d) 160 Alta CA.

⁴ [1986] Ch 211.

“ The conduct of the petitioner may be material in a number of ways, of which the two most obvious are these. First, it may render the conduct on the other side, even if it is prejudicial, not unfair. Secondly, even if the conduct on the other side is both prejudicial and unfair, the petitioner's conduct may nevertheless affect the relief which the court thinks fit to grant ... In my view there is no independent or overriding requirement that it should be just and equitable to grant relief or that the petitioner should come to the court with clean hands. (Citations omitted.)



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.

22. Having arrived at the above conclusions, it is my finding that the Petitioner's Petition is merited. Accordingly, I allow the amended Petition dated 28th April 2021 and issue the following orders:-

- a) A declaration be and is hereby issued that the 1st and 2nd Respondents actions are oppressive and/ or are unfairly prejudicial to the interests of the Petitioners.
- b) An order be and is hereby issued compelling the 1st and 2nd Respondents to relinquish their rights as shareholders/directors of the 3rd Respondent Ndey Villas Management Limited within 10 days from the date of service of this order in default, they will be deemed to have forfeited the said shares.
- c) An order be and is hereby issued directing the Registrar of Companies to delete the names of the 1st and 2nd Respondents as shareholders of the 3rd Respondent Ndey Villas Management Limited after the expiry of the 10 days provided in order (b) above if the 1st and 2nd Respondents will not have relinquished the shares as herein above ordered and in their place list the 1st and 2nd Petitioners as shareholders having one share each
- d) That further, upon the above orders being complied with, the 1st and 2nd Petitioners shall be required to allot shares to all the other Petitioners as provided under the terms of the leases giving ownership of the property to the Petitioners.
- e) That the 1st and 2nd Respondents shall bear the costs of this Petition.

Orders accordingly

SIGNED, DATED AND DELIVERED VIA E-MAIL AT NAIROBI THIS 21ST DAY OF SEPTEMBER 2021

JOHN M. MATIVO

JUDGE

