Adan v Farah & 3 others (Civil Suit 100 of 2016) [2021] KEHC 107 (KLR) (Commercial and Tax) (1 October 2021) (Ruling)

Neutral citation: [2021] KEHC 107 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

CIVIL SUIT 100 OF 2016

A MABEYA, J

OCTOBER 1, 2021

BETWEEN

YUSUF ABDI ADAN ..... PLAINTIFF

AND

HUSSEIN AHMED FARAH ..... 1ST DEFENDANT

HUSSEIN UNSHUR MOHAMMED ..... 2ND DEFENDANT

MOHAMED ABDIKADIR ADAN ..... 3RD DEFENDANT

BLUE BIRD AVIATION LIMITED ..... 4TH DEFENDANT

RULING

1. The unending circus! These parties are again back in court. In a dispute that arose in 2016, a small matter of permission to bring a derivative suit, dragged in court until 29/7/2021. By a ruling of that date, this Court dismissed the said application presuming that that would mark the end of the dispute. But the court was wrong. The parties are back again.

2. At the center of this dispute is the 4th respondent ("the Company") and therefore its assets. The record shows that the applicant and the 1st to 3rd respondent hold 25% shareholding in the company. The parties know the truth of the basis for the dispute but the Court does not know.

3. I think it would be proper to begin by recalling what the Holy Books remind us mortals as we sojourn in this world. In Sura Al-Baqarah: 2:188, the Holy Quran decrees: -

> " And eat up not one another's property unjustly, (in any illegal way eg. stealing robbing, deceiving, etc) nor give bribes to the rulers that you may knowingly eat up a part of the property of others sinfully".

4. Then in Sura An-Nisa: 4:58, the same Holy Quran decrees to us Judges: -

> " Verily! Allah commands that you should render back the trusts to those to whom they are due; and that when you judge between men, you judge with justice. Verily, how excellent is the teaching which He (Allah) gives you! Truly, Allah is Ever All-Hearer, All-Seer".

5. Closer home, in Deuteronomy 1:16-17, the Holy Bible decrees: -

> " I charged your judges that time, 'Listen to complaints among your kinsmen, and administer true justice to both parties even if one of them is an alien. In rendering judgement, do not consider who a person is; give ear to the lowly and to the great alike, fearing no man, for judgement is God's. Refer to me any case that is too hard for you and I will hear it'".

6. After the applicant's application for a derivative suit was dismissed on 29/7/2021 as aforesaid, he took out a Motion on Notice dated 23/08/2021. The Motion was brought under Section 780 and 782 of the *Companies Act* 2015 and Order 40 Rule 1, Order 45 Rule 1 of the *Civil Procedure Rules, 2010*.

7. The motion was supported by his affidavit which he swore on 23/08/2021 and a further affidavit of 25/8/2021. The Motion sought various orders including; an injunction to restrain the respondents from disposing any of the Company's assets and/or properties. There was also a prayer for the review and setting aside of the ruling and order of 29/7/2021 with a prayer that the permission to continue with the derivative suit be granted.

8. In the alternative, the applicant sought that the dismissal order of 29/7/2021 be substituted with an order that he be bought off and consequent whereof the company be valued by a reputable firm to determine the value of his shares and his unpaid dividends in the company.

9. The application was based on the grounds that; the applicant was not afforded a chance to adduce evidence and call witnesses in the substantive suit before the ruling of 29/7/2021. That the Court determined substantive questions of evidentiary value at a preliminary stage. He contended that instead of the application being dismissed, the Court should have granted him the remedy of being bought off as his relationship with the respondents had irretrievably broken down.

10. He indicated that he was an elderly man of over 80 years and he had been totally excluded from the management of the company. The Company was being managed in an oppressive and unfair manner. He made various allegations against the 1st, 2nd and 3rd respondent some of which echoed those which he had made in the dismissed application.

11. The application was robustly opposed by the respondents. The 1st respondent filed grounds of opposition dated 26/8/2021 and a replying affidavit sworn on 3/9/2021. While the 3rd and 4th respondent both filed preliminary objections.

12. In his grounds of opposition, the 1st respondent contended that the application did not fall under Order 45 of the Civil Procedure Rules. That the application was bad in law and an abuse of the court

process. That the applicant had come to court with unclean hands and that there was no suit upon which the court could exercise its jurisdiction.

13. In his replying affidavit, he averred that the applicant was rehearsing what he had stated in the dismissed application. That the facts relied on cannot be a basis for a review and that the applicant was trying to introduce a new suit to a different cause of action. That in any event, the applicant's advocates had confirmed that the entire suit had been dismissed and there was therefore no suit in existence.

14. The 3rd respondent's preliminary objection was dated 30/8/2021. He contended that the application was a mischievous appeal as it challenged the merits of the Court's decision of 29/7/2021; that the Court therefore lacked the jurisdiction to reconsider the merits of the said ruling.

15. He further contended that the application was res judicata for seeking the remedy of purchase of shares on the same grounds that had been considered and rejected by the Court. Further, that the application had introduced unfair prejudice and oppressive conduct which amounted to a new suit under sections 780 and 782 of the *Companies Act*. Finally, that the application did not meet the requirements for review under section 80 of the *Civil Procedure Act* as read together with Order 45 of the Civil Procedure Rules.

16. The 4th respondent's preliminary objection was dated 25/8/2021. It opposed the subject application on the grounds that the court could not grant injunctive relief to the applicant as there was no competent suit before Court within the meaning of sections 780 and 782 of the *Companies Act*. That the application was an invitation for the Court to sit on appeal against its own decision.

17. That the application which sought permission to institute a derivative claim was an interlocutory application for which there was no provision requiring viva voce evidence under section 238 and 239 of the *Companies Act* 2015. Further that, the subject application sought to convert what was a derivative action into a claim for protection against oppressive conduct and unfair prejudice which entailed an ulterior purpose and an abuse of the court process.

18. The Court ordered that the Motion be heard and the preliminary objections were to be treated as part of the grounds of opposition thereto.

19. Both the 3rd and 4th defendants filed submissions in support of their respective preliminary objections. The applicant responded to the respondent's submissions vide his supplementary submissions dated 13/09/2021, wherein he addressed the preliminary objections raised.

20. The Court has considered the parties contentions, the preliminary objections, and the entire record. I propose to begin with the preliminary objections.

21. A Preliminary Objection was defined in the *Mukisa Biscuits Manufacturing Co. Ltd v. West End Distributors Ltd* (1969) EA 696 to consist a point or points of law which if argued as a preliminary point may dispose of a suit. It is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact is to be ascertained or if what is sought is the exercise of judicial discretion.

22. The preliminary objections were grounded, inter alia, on the fact that the application was res judicata, that the Court lacked jurisdiction to grant injunctive orders as there was no substantive suit; that the application for review was an appeal in disguise; that it failed to meet the conditions for granting orders for review; and that the application introduced a new suit thus unfairly prejudicing the respondents.

23. The facts pleaded that were not disputed by way of replying affidavits were that, the applicant is a 25% shareholder in the Company; that he had been completely excluded from its management by the 1st to

3rd respondent; that he had not been paid his dividends since 2016, that the respondents had offered to buy him out and the Court had identified that to be one of the remedies open to him. It is on the basis of these undisputed facts that I would consider the preliminary objections.

24. From the preliminary objections and the submissions made, the court will address the grounds raised to be as follows:-

    a. Whether the application is res judicata;

    b. Whether the application meets the grounds for review;

    c. Whether the application is an appeal in disguise;

    d. Whether the application introduces a new suit;

Whether the application is res judicata.

25. Both the preliminary objections contended that application was res judicata as it raised issues that had already been canvassed in the ruling of 29/7/2021.

26. The Court has analyzed the grounds of review in the application and supporting affidavit. The majority of the grounds set out in support of prayer 1 are but a regurgitation of the issues raised and comprehensively determined in the ruling of 29/7/2021. To the extent that the application sought that the orders of 29/7/2021 be substituted with an order permitting the bringing a derivative suit, that would be to review the order on the same grounds that had been rejected by the Court.

27. In this regard, the Court holds that, in so far as the prayer for review and granting of permission to bring a derivative suit is concerned, the matter is res judicata. The grounds that the applicant was not afforded an opportunity to present his witnesses is but hot air. The Court agrees with the submissions of the 1st respondent that what was before Court was an application which had no room for viva voce testimonies.

28. However, as regards the alternative prayer, I find that the relief as well as grounds in support thereof are not res judicata. This is because, firstly, there was no prayer in the application of 30/3/2016 for the buying out of the applicant from the Company nor the issue of non-payment of dividends between 2016 and 2021. The same could not have been raised as it had neither occurred nor arisen.

Whether the application meets the grounds for review.

29. The jurisdiction to review an order of a Court is provided for under section 80 of the *Civil Procedure Act* and adumbrated by Order 45 Rule 1 of the Civil Procedure Rules. Under the said provisions, review can only be allowed if there is discovery of a new and important matter of evidence which despite exercise of due diligence was not known or could not be produced at the time the order was made; or there is a mistake or error apparent on the face of the record; or for any other sufficient reason.

30. The application was predicated upon sufficient reason. The Court reiterates that the reasons advanced, to wit, that the applicant was not afforded an opportunity to present his witnesses is not sufficient reason to revisit the orders of 29/7/2021. In this regards, this Court cannot re-engage itself on matters that it had already pronounced itself on, which unfortunately make the bulk of the grounds for prayer 1 of the application.

Whether the application is an appeal in disguise.

31. The main ground for seeking the review of the ruling dated 29/7/2021 under prayer 1 is that the Court failed to appreciate the applicant's list of witnesses whom he intended to call at the hearing of the suit.

That if the court had considered the documents and list of witnesses in the substantive suit, it would have granted him leave to proceed with the derivative claim.

32. To the Court's mind, these grounds were but a dissatisfaction by the applicant with the Court's alleged misapprehension of the procedure and the substantive law regarding derivative claims. This in my view is for appeal and not review.

33. In *Republic v Public Procurement Administrative Review Board & 2 Other* [2018] eKLR, the court quoted with approval the decision in *National Bank of Kenya Ltd vs Ndungu Njau* [1996] KLR 469 (CAK) at page 381 where the court held: -

> " In my discernment, an order cannot be reviewed because it is shown that the judge decided the matter on a foundation of incorrect procedure and or that his decision revealed a misapprehension of the law, or that he exercised his discretion wrongly in the case. Much less could it be reviewed on the ground that the other judges of coordinate jurisdiction and even the judge whose order is sought to be reviewed have subsequently arrived at different decisions on the same issue" In my opinion the proper way to correct a judge's alleged misapprehension of the procedure or the substantive law or his alleged wrongful exercise of discretion is to appeal the decision unless the error be apparent on the face of the record and therefore requires no elaborate argument to expose."

34. I fully reiterate the foregoing here. If the applicant was aggrieved with the Court's interpretation of the law and the procedure undertaken, the proper forum should be appeal and not review.

Whether the application introduces a new suit.

35. The respondents contended that the application introduced unfair prejudice and oppressive conduct which amounts to a new suit under sections 780 and 782 of the *Companies Act*. The applicant contended otherwise. That it was not a new cause of action but a right of action.

36. The application was brought under, inter alia, section 780 and 782 of the *Companies Act*, 2015. These two sections provide for protection of members of a Company against oppressive conduct and unfair prejudice. The applicant also prayed for alternative remedies at orders D-G, including a valuation of his shares in the defendant company and resultant buy-out of his shares by the respondent's, and a determination and payment of all his outstanding dividends.

37. The applicant contended that this Court did acknowledge in its ruling of 29/7/2021, that he had alternative remedies that he should have pursued rather than a claim for a derivative suit which he had pursued. That in the circumstances, he should be granted the same. On the other hand, the respondents contended that, that is a completely new suit that was not there in the dismissed suit and cannot therefore be a subject of review.

38. It is not in dispute that way back in March, 2016, the applicant was offered by the respondents to be bought-off but he chose not to. There is that right of buy-out in the Memorandum and Articles of Association of the Company. The ruling of 29/7/2021 identified the exercise of being bought-off by the respondents as one of the remedies available to the applicant. Can the applicant now come back and seek that remedy on review?

39. In the application dated 30/3/2016, the applicant did not seek that remedy. The Court is cognizance of the fact that as at the date he lodged the said application, section 780 of the *Companies Act*, 2015 had not been operationalized. He could not therefore pray for that remedy at that point in time.

40. It would seem that in proceedings under section 782 of the *Companies Act*, a Court can grant a relief for bringing a derivative suit. This is so because section 782(2)(c), provides that the court "may authorize 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".

41. On the other hand, in an application for permission to bring a derivative suit under sections 238 and 239 of the Act, the court is also permitted to "make any consequential order it considers appropriate".

42. As at the time the parties were before Court before the making of the ruling of 29/7/2021, there was clear evidence that the applicant could not see eye to eye with the respondents. Their relationship had completely broken down. The applicant had belligerently sought to wind up the Company and also bring a derivative suit. That state of affairs has not changed to date. Nothing would have prevented the Court then from ordering the buying out of the applicant's shares if it had been sought.

43. In *Lawrie Grace v. Marcello Biagioli & 3 Others* [2005] EWCA Civ 1222, the Supreme Court of Judicature Court of Appeal of UK held: -

> " Once unfair prejudice is established, the court is given a wide discretion as to the relief which should be granted. ... the court has to look at all the relevant circumstances in deciding what kind of order it is fair to make. ... In Re Bird Precision Bellows [1986] Ch. 658, Oliver LJ described the appropriate remedy as one which would 'put right and cure for the future the unfair prejudice which the petitioner has suffered at the hands of the other shareholders of the company'. The prospective nature of the jurisdiction is reflected in the fact that the court must assess the appropriateness of any particular remedy as at the date of the hearing and not at the date of presentation of the petition; and may even take into account conduct which has occurred between those two dates. The court is entitled to look at the reality and practicalities of the overall situation, past present and future".

44. I reiterate the foregoing here. It is not in dispute that as at the time of the hearing of the application for permission, the applicant had established a case for unfair prejudice. Both the respondents and the Court agreed that that is the route the applicant should have taken instead of the one of permission.

45. The Court is not in agreement with the respondents that the applicant is introducing a new cause of action. He is only telling the Court that, since it had been found that the buying out remedy was an option for him, he be granted that remedy at this stage.

46. The Court takes into consideration the fact that there were no affidavits filed in opposition to the supporting and further affidavit of the applicant. All those new matters sworn to by the applicant that had not been dealt with in the earlier application remained uncontested. The applicant is an old man of 80 years. He has been in court since 2016. He has contended, and it is not denied, that he has never received any dividends since 2015. The relationship between him and the respondents has irretrievably broken.

47. In the circumstances, the question the Court should consider is, is it fair and just that the applicant be told to go and file fresh proceedings which will take another 5 years or more to be concluded for a remedy he was long entitled to? Will it be fair and just to tie the scarce judicial time to another grueling litigation on a matter which can be determined now. I think not.

48. Under Article 159 of the Constitution, the overriding objective of the law is expeditious determination of disputes. That substantive justice be meted out without regard to technicalities. It will not be just to subject the parties to yet another round of litigation while it is too open that, their marriage holds no more. The marriage bed is on fire. It is no longer tenable for them to continue as partners or members

of the Company. It is not in the best interest of the Company and its commercial operations that the parties continue to be together. That the right for a buy-out exists.

49. The respondents had as early as March, 2016 asked the applicant to exercise the right to be bought off. The correspondence is on record and they have positively sworn to that fact. Why should they now turn around and back off? The offer of March, 2016 has never been withdrawn. Article 9 of the Memorandum and Articles of the Company permit the buying out of shares of an exiting shareholder. Equity treats as done that which ought to be done. See *Kiplagat Kotut v. Rose Jebor Kipngok* [2019] Ekrl. If there be a case where the maxim applies, this is it.

50. The only wrong the applicant committed is that he pursued a claim for permission instead of one for oppressive and unfair prejudice. The Court did find that some of the claims in the earlier application were for the benefit of the Company. That would have entitled the applicant to permission to bring the derivative suit. However, the Court found that a greater portion of the claim was personal and that it was therefore not fair to burden the Company. That he should have pursued the claim for oppressive and unfair prejudice.

51. In this regard, the fact that the applicant is seeking that remedy now by way of review, I do not think he should be barred. I know no law that bars him from doing so Equity will not suffer a wrong without a remedy. In *LTI Kisii Inns Ltd & 2 Others v. Deutsche Investitions-Und Enwicklungsgelleschaft ('DEG') & Others* [2011] Eklr, the Court of Appeal held: -

> "It is regrettable that despite these lamentations, the learned Judge did not render justice between the parties according to law. It is not enough for a court of law to tell a victim of injustice that a wrong had been perpetrated against him without offering a remedy. It is a maxim of equity that Equity will not suffer a wrong without a remedy. The idea expressed in this maxim is that no wrong should be allowed to go undressed it is capable of being remedied by courts of law".

52. The fact that the Court did not grant that remedy on 29/7/2021 under sections 238 and 239 of the Act as a consequential order does not stop it from granting it now. The wrong suffered by the applicant has to be remedied.

53. In view of the foregoing, I am of the view that justice demands that the earlier the parties part the better for them and the Company. It will be unreasonable, unfair and unjust to subject the parties to yet another litigation to establish what has already been established. In this regard, I am satisfied that there are sufficient grounds to review the order of 29/7/2021 on the remedy to be given. The alternative prayer therefore succeeds.

54. The upshot is that the Notice of Motion dated 23/8/2021 is hereby allowed in the following terms: -

    a) The prayer for review and granting permission to bring a derivative suit is denied.

    b) The alternative prayer is allowed and the ruling and order of 29/7/2021, that dismissed the application dated 30/3/2016 is hereby reviewed and substituted with an order that the plaintiff be bought off.

    c) The plaintiff's shares in the 4th respondent be purchased by the remaining shareholders, that is, the 1st, 2nd and 3rd respondent or anyone of them or by the 4th respondent, and the Company's capital be reduced accordingly.

d. Consequently, the parties are hereby directed to agree within 14 days of the date hereof, on the appointment of a reputable firm to undertake the valuation of the 4th respondent with a view of ascertaining the value of the plaintiff's shareholding thereon for subsequent purchase as aforesaid. In default, the Court shall appoint one.

e. This matter is to be mentioned on a day to be fixed at the delivery of this ruling for compliance.

f. Although the applicant was successful, however, for failure to have sought the remedy initially, I will make no order as to costs.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 1ST DAY OF OCTOBER, 2021.

A. MABEYA, FCI Arb

JUDGE