Rao v Shreeji Chemicals Limited & 3 others (Petition E005 of 2021)
[2021] KEHC 303 (KLR) (Commercial and Tax) (11 November 2021) (Ruling)

Neutral citation: [2021] KEHC 303 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

PETITION E005 OF 2021

WA OKWANY, J

NOVEMBER 11, 2021

BETWEEN

MUKKASA GIRIDHAR RAO ..... APPLICANT

AND

SHREEJI CHEMICALS LIMITED ..... 1ST RESPONDENT

HARESH VRAJLAL DAMODARDAS SONI ..... 2ND RESPONDENT

DELTA INTERNATIONAL FZE ..... 3RD RESPONDENT

SHREEJI ENTERPRISES (K) LIMITED ..... 4TH RESPONDENT

RULING

1. This ruling is in respect to the application dated 30th April 2021 wherein the applicant/plaintiff seeks orders that: -

    1) Spent

    2) Spent

    3) This Honourable Court be pleased to grant a temporary injunction restraining the 1st, 2nd and 3rd Respondents including the 1st Respondent's Board of Directors by themselves, their agents, employees or anyone acting for them, from increasing the 1st Respondent's share capital or otherwise dealing with the shares of the 1st Respondent, pending the hearing and determination of this application.

    4) This Honourable Court be pleased to grant a temporary injunction restraining the 1st , 2nd and 3rd Respondents including the 1st Respondent's Board of Directors by themselves, their agents, employees or anyone acting for them, from participating in, or convening the meeting of 6th

May 2021 and any other subsequent meetings, for purposes of removing or consenting to the Applicant's removal as a director of the 1st Respondent as well as the allotment and issuance 2,575,705 ordinary shares to the 3rd Respondent and 1,200,000 ordinary shares to the 4th Respondent, pending the hearing and determination of this application.

5) This Honourable Court be pleased to order that until the completion of the procedure in prayer (3) above, the 1st Respondent will serve the Applicant with all future notices convening general and board meetings of the 1st Respondent, pending the hearing and determination of this application.

6) This Honourable Court be pleased to grant a temporary injunction restraining the 1st, 2nd and 3rd Respondents including the 1st Respondent's Board of Directors by themselves, their agents, employees, or anyone acting for them, from increasing the 1st Respondent's share capital or otherwise dealing with the shares of the 1st Respondent, pending the institution and referral of the dispute between the Applicant and the Respondents to arbitration in accordance with paragraph 44 of the Articles.

7) This Honourable Court be pleased to grant a temporary injunction restraining the Respondents from registering any allotment or issuance or transfer of any shares in the 1st Respondent in favour of the 3rd and 4th Respondents or any other party without complying with the pre-emption provisions contained in the Articles of Association of the 1st Respondents and the *Companies Act*, pending the institution and referral of the dispute between the Applicants and the Respondents to arbitration in accordance with paragraph 44 of the Articles.

8) This Honourable Court be pleased to grant a temporary injunction restraining the 1st, 2nd and 3rd Respondents including the 1st Respondent's Board of Directors by themselves, their agents, employees or anyone acting for them, from participating in, or convening the meeting of 6th May 2021 and any other subsequent meetings, for purposes of consenting to the Applicant's removal as a director of the 1st Respondent as well as the allotment and issuance 2,575,705 ordinary shares to the 3rd Respondent and 1,200,000 ordinary shares to the 4th Respondent, pending the institution and referral of the dispute between the Applicants and the Respondents to arbitration accordance with paragraph 44 of the Articles.

9) This Honourable Court be pleased to order that until the completion of the procedure in prayer (7) above, the 1st Respondent will serve the Applicant with all future notices convening general and board meetings of the 1st Respondent, pending the institution and referral of the dispute between the Applicants and the Respondents to arbitration accordance with paragraph 44 of the Articles.

10) The costs of this application be borne by the Respondents.

2. The application is brought under Section 7 of the *Arbitration Act*, Sections 780 and 782 of the *Companies Act* (hereinafter "the Act"), Order 40 Rules 1, 2, 4, 8 and Order 51 Rule 1 of the *Civil Procedure Rules*.

3. The application is supported by the applicant's affidavit and is premised on the grounds that: -

a) The Applicant is a shareholder and director of the 1st Respondent (the Company). The 3rd Respondent is the majority shareholder of the Company, with a shareholding of 900,000 ordinary shares, followed by the 2nd Respondent with a shareholding of 787, 500 shares and lastly the Applicant, with a shareholding of five hundred and sixty-two thousand, five hundred (562, 500) ordinary shares (the Shares).

b) The Applicant and the 2nd Respondent entered into a memorandum of understanding on 4th April 2019 (2019 MOU) where it was agreed that if the Applicant was to sell or transfer his shareholding in the Company, it would be on the basis of what was entered into between the Applicant and the 2nd Respondent on 18th September 2020 (2020 MOU).

c) Furthermore, during a high-level meeting between various directors and senior management of the Applicant including the 2nd Respondent, Mr. Dhawal Soni, Mr. Bhupati Mahesh Varma and Mr. Umang H. Soni on 8 January 2021, an agreement was reached to the effect that the Applicant's shareholding would not be diluted. It was also a term of the 2020 MOU that should the Applicant wish to sell or transfer his shares in the Company, he shall offer his shares to existing shareholders only at the estimated book/market value.

d) A dispute on the proposed basis of valuing the Shares arose between the 2nd Respondent and the Applicant which was referred to Mr. Sanjeev Khagram of A.B. Patel & Patel Advocates (A.B. Patel Advocates). On 22 February 2021, a meeting was held at A.B. Patel Advocates, where the 2nd Respondent offered to buy the Applicant's Shares in the Company. The Applicant agreed to sell his Shares in the Company subject to the valuation of the Shares at fair value by an independent person or persons either jointly appointed by the Applicant and the 2nd Respondent or individually.

e) On 16th March 2021, a further meeting was held where the 2nd Respondent reiterated his offer to buy the Shares at face value and a share in the dividends of the Company as per the audited accounts of 2019. However, that offer was not acceptable to the Applicant. Sometime thereafter, the Applicant requested for audited accounts of the Company from 2010 to 2019 and management accounts for 2020 in order to proceed with the fair value determination that had been discussed and agreed upon. However, these requests were ignored and denied without any explanation or reason provided.

f) On 7th April 2021, the Applicant received a notice from Sage Registrars (the EGM Notice), informing him that an Extra-Ordinary General meeting (the EGM) is scheduled to take place on 6th May 2021, for purposes of effecting his removal as a director of the Company and to increase the share capital of the Company for purposes of converting debts allegedly owed to the 3rd and 4th Respondents to equity. Furthermore, the allotment of 2,575,705 ordinary shares to the 4th respondent is to be approved at the said meeting.

g) Article 11 of the Articles of Association (Articles) provides that unless otherwise determined at a general meeting, any original shares being issued and any new shares that are to be created, should, before they are issued, be offered to the members, in the proportion as nearly as may be, to the number of shares held by the said members. Such an offer is required to be made by notice and it must specify the number of shares to be offered as well as give a time limit within which the offer will be deemed to have been declined, if it is not accepted.

h) After the expiration of such time given for the offer, on receipt of any intimation from the person to whom the offer is made, declining to accept the offer, the directors may, subject to the Articles, dispose of the same as they think beneficial to the Company. In absence of a notice period in the Articles, the notice period to be observed is not less than 21 days, as provided under section 339 of the *Companies Act*, 2015 (the *Companies Act*).

i) Based on the provisions of the Articles, unless authorized pursuant to a duly convened general meeting, the 1st and 2nd Respondents have no authority to allot shares to the 3rd and 4th Respondents, without first offering any newly created shares, on a proportionate basis, to

the Applicant as an existing shareholder of 25% of the Company's issued share capital, in accordance with the process set out in the Articles and in section 339 of the *Companies Act*.

j) Furthermore, the Company has no authority to give notice and pass resolutions purporting to allot and issue shares to non-shareholders or to add new members to the Company, in breach of the Articles and the *Companies Act*, where such actions are taken without the consent of the Applicant as an existing shareholder.

k) It is quite evident that the purpose of the meeting is to dilute the Applicant's shareholding in the Company as the 2nd Respondent is pursuing an unlawful and unfair advantage against the Applicant in his position as a controlling shareholder of the Company and in further breach of the agreement that was entered into during the meeting of 8 January 2021. Further, the 2nd Respondent is frustrating the Applicant's efforts to obtain the benefit of the economic value of the Applicant's 25% shareholding in the Company by reducing the percentage of the fair value that the Applicant is entitled to, for the Shares. As such, the proposed process of increasing the share capital of the Company, allotment and issuance of shares to the 3rd and 4th Respondents, is in breach of the Applicant's rights as a minority shareholder under the Articles and section 345(4) of the *Companies Act*.

l) The discussions in relation to the transfer of the Shares is ongoing and fully within the knowledge of all the shareholders and directors of the Company and if any actions are taken to dilute the Applicant's shareholding in the Company, those actions would materially reduce his economic interest in the Company. The effect of the proposed transfers would be entirely for the sole benefit of the 2nd Respondent and entities owned or controlled by him.

m) Furthermore, as per the EGM Notice, the Company allegedly owed the 3rd and 4th Respondents a debt of KES 514,519,228 and the proposal is to settle an amount of KES 377,570,500 against the said debt by issuing shares to the 3rd and 4th Respondents. However, based on the Company's records as well as the Applicant's knowledge, the Company has not incurred any further debt in favour of the 4th Respondent and no loans have been advanced by the 3rd Respondent to the Company. Therefore, there is no lawful cause or justification for the issuance of the additional shares to the 3rd and 4th Respondents to settle the alleged debts which have not been proven.

n) Any issuance of such shares would be for the personal benefit of the 1st, 2nd and 3rd Respondents as there is no proof of such debt that is owed to the 3rd and 4th Respondents, which are companies that are largely controlled/ owned by the 2nd Respondent.

o) The 3rd Respondent's Management Accounts of August 2020, which were shared with the board of directors of the Company, (including the Applicant), by way of email on 5th October 2020, indicated that the 3rd Respondent had a nil balance. Therefore, it is not clear how the amounts allegedly owed to the 3rd and 4th Respondents were arrived at, since no supporting documentation or substantiation has been provided.

p) The Applicant issued an objection to the EGM vide his letter dated 23rd April 2021 and requested that the meeting be postponed, to allow his rights as a shareholder in relation to any new shares in the Company to be respected and to allow for the ongoing discussion concerning the sale of the Shares. As at the time of filing this Petition, the Respondents have not responded to the Objection Letter.

q) Since the Applicant and the Company have been unable to agree on the value of the Applicant's shareholding, the Applicant issued a Notice of Transfer dated 27th April 2021, to offer the sale

of the Shares for USD 3,460,000, based on an independent valuation that was conducted by Grant Thornton, Kenya.

r) Unless this Honourable Court intervenes and urgently issues the orders sought, the Applicant stands to suffer irreparable loss and he will be greatly prejudiced as the proposed resolutions will reduce the Applicant's shareholding to less than 10% of the Company, despite an explicit understanding between the Applicant and the 2nd Respondent that no actions would be taken to dilute the Applicant's shareholding and despite the fact that there is an ongoing process that will deal with the sale of the Shares, in accordance with the Articles.

s) It is in the interest of justice that the orders be granted as prayed, to prevent the dilution of the Shares and to allow the process of the sale of the Shares to proceed as provided under the Articles.

4. The respondents filed the following pleadings in response to the application: -

i. The 1st Respondent's Replying Affidavit sworn by Umangkumar Haresh Soni who avers that the arbitration clause or agreement was strictly limited to the differences between the Company, on one hand and any of the members, their executors, administrators or assigns on the other hand. He further states that Clause 9 of the Company's Articles of Association restricts transfer of the 1st respondent's shares. It is the 1st respondent's case that that the Petitioner's removal from the position of a director was done in strict compliance with the provisions of the *Companies Act* and that Article 11 of the Company's Articles of association empowers the 1st respondent to increase the share capital by allotting new shares without offering the same to members of the 1st respondent. The 1st respondent maintains that the proposed increment of share capital and allotment of shares does not in any way amount to prejudicial or oppressive treatment of the Petitioner or any other shareholder.

ii. The 2nd Respondent's Replying Affidavit sworn by Haresh Vrajlal Damodardas Soni on 12 May 2021.

iii. The 3rd Respondent's Replying Affidavit sworn by its shareholder Mr. Haresh Vrajlal Damodardas Soni, who states that the Company's Articles of Association sets out the manner in which a party can transfer their shares and that the petitioner expressed the intention to sell his shares to the Company's shareholders through a notice of transfer of shares dated 27th April 2021. He states that there exists a legally binding contract between the petitioner and the 3rd respondent and the same should not be interfered with by the interim or injunctive orders. He further states that as a director and shareholder of the Company, the petitioner is indebted to the 3rd respondent and that he has not demonstrated that he is entitled to the injunctive orders sought.

iv. The 4th Respondent's Replying Affidavit sworn by its Director and Shareholder Mr. Dhaval Vinodbhai Soni Dhaval Vinodbhai Soni who confirms the existence of an arbitration clause under the 1st respondent's Articles of Association but adds that the 4th respondent is not governed by the said arbitration agreement since it is neither a shareholder nor a member of the 1st respondent. He avers that the petitioner acknowledged that the 1st respondent owes the 4th respondent the sum of Kshs 396 million as at 31st December 2019 and cannot therefore deny the said debt. He faults the petitioner for failing to comply with Section 780 and 782 of the *Companies Act* 2015.

5. The respondents also filed a Notice of Preliminary Objection in which they listed the following grounds: -

(a) That the Honourable Court does not have the Jurisdiction to hear the Chamber Summons dated 30/4/2021 and the Petition dated 30/4/2021 because there is no arbitration clause governing any alleged differences amongst the Petitioner/Applicant and the 2nd, 3rd, and 4th Respondents as shareholders of the 1st Respondent, Shreeji Chemicals Limited. The arbitration clause under Clause 44 of the Articles of Association of the 1st Respondent is strictly limited to differences arising between the Company (Shreeji Chemicals Limited), on the one hand, and, members, their executors, administrators, or assigns on the other hand.

(b) The Chamber Summons dated 30/4/2021 and the Petition dated 30/4/2021 are fatally defective on account of non-compliance with the explicit provisions of Section 780 and 782 of the *Companies Act*, 2015. Section 780 and 782 of the *Companies Act*, 2015 provide that any application for protection against alleged oppressive conduct and unfair prejudice must be singularly and entirely made against the Company in contrast to the pleadings filed by the Petitioner/Applicant which have enjoined shareholders namely the 2nd, 3rd, and 4th Respondents.

(c) In this petition, the Petitioner/Applicant has filed its application, through the Chamber Summons dated 30/4/2021 and the Petition dated 30/4/2021 against not only the Company but its shareholders namely, the 2nd, 3rd, and 4th Respondents. For this reason, the Petitioner/Applicant has not suitably invoked the jurisdiction of this Honourable Court in line with the requirements of Section 780 and 782 of the *Companies Act*, 2015. This means that this Honourable Court does not have the jurisdiction to hear the Petitioner's/Applicant's Chamber Summons dated 30/4/2021 and the Petition dated 30/4/2021.

6. Parties canvassed the application by way of written submissions.

The Petitioner's Submissions

7. The petitioner submitted that the P.O does not raise pure points of law that are capable in determining the application. He argued that the court should not delve into the merits of the dispute/agreement lest it interferes with the jurisdiction of the arbitral tribunal. It was submitted that the arbitral clause under Article 44 of the Company's Articles of Association is applicable to disputes between the Company and its members. For this argument, reference was made to the decision in *Tash Goel Vedprakash vs. Moses Wambua Mutua & another [2014] eKLR*, where the court held that;

> " ..... Transfer of shares is also a matter of the Articles. And in accordance with clause 33 of the Memorandum and Article of Association of the Company, every such dispute or differences shall be referred to and determined by a sole arbitrator...." The thinking that Articles of Association constitute a contract not only between every member and the company, but also among the members of the company inter se ordains that the disputes herein are disputes which are amenable to the arbitration agreement in the Articles....."

8. The applicant submitted that the question as to whether all or some of the Respondents should be parties to the arbitration proceedings is not an issue for determination before this Honourable Court but would be a question that the arbitrator will determine.

The Respondents' Submissions

9. The 1st, 2nd, 3rd and 4th respondents filed joint submissions wherein they argued that there is no arbitration agreement between the petitioner on one hand, as a party, and the 2nd, 3rd and 4th respondents. It was submitted that the 2nd, 3rd and 4th respondents do not have any defined legal relationship amongst them that contains an arbitration agreement and that the arbitration clause under

Article 44 is strictly limited to differences between the company on one hand as a party and any other members, their executors, administrators or assigns on the other hand as another party.

10. The respondents maintained that Article 44 of the 1st Respondent's Articles of Association does not bind the 2nd, 3rd, and 4th Respondents who were not privy to the arbitration agreement. It was further submitted that the application does not satisfy the conditions for the granting of the interim injunctive orders sought.

11. The Respondents maintained that the Petitioner did not demonstrate that the 1st Respondent's actions are ultra vires, fraudulent, prejudicial, oppressive and not rectifiable by an ordinary resolution.

Analysis and Determination

12. I have carefully considered the pleadings filed by the parties herein, their written submissions and the authorities that they cited. The main issues for determination are, firstly; whether the preliminary objection is merited and secondly; whether the applicant has made out a case for the granting of the orders sought in the application.

Jurisdiction.

13. The Preliminary Objection challenges the jurisdiction of this court to entertain both the suit and the application on the basis that there is no arbitration agreement between the petitioner and the 2nd, 3rd and 4th respondents so as to justify the issuance of preservation orders under Section 7 of the *Arbitration Act*. The respondents maintained that the arbitral clause in the Company's Articles of Association was only binding on the Company and its members. The Respondents also maintained that the Application and Petition are defective on account of non-compliance with sections 780 and 782 of the *Companies Act* which provide that an application for protection against alleged oppressive conduct and unfair prejudice must be singularly and entirely be made against the Company. The Respondents therefore argued that the 2nd, 3rd and 4th Respondents should not have been joined to the proceedings.

14. The applicant, on the other hand, submitted that the Preliminary Objection does not raise pure points of law and that the arbitral clause governs the disputes between the parties herein. The applicant argued that the application is not only brought under Section 7 of the *Arbitration Act* but also under Sections 780 and 782 of the *Companies Act* which empowers the court to issue appropriate reliefs in respect to the matters before it.

15. What constitutes a preliminary objection was discussed in *Mukisa Biscuit Manufacturing Company Ltd vs West End Distributors Ltd [1969] EA 696* as follows: -

> " so far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit per Sir Law J.A."

16. Sir Charles Newbold P. in the same case stated that: -

> " A preliminary objection is in the nature of what use to be a demurer. It raises a pure point of law which is argues on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought if exercise of judicial discretion."

17. Clause 44 of the Company's Articles of Association provides that: -

> "Whenever any differences arise between the Company on the one hand and any of the members, their executors, administrators, or assigns on the other hand, touching [sic] the true intent or construction, or the incidents, or consequences of these Articles, or of the statutes or touching on anything then or thereafter done, executed, omitted, or suffered in pursuance of these Articles, or of statues or touching on any breach, or alleged breach, of these Articles, or any claim on account of any such breach or alleged breach of this, or otherwise relating to the premises, or to these Articles or to any statutes affecting the Company, or to any affairs of the Company, every such difference shall be referred to the decision of any arbitrator, to be appointed by the parties in difference, or if they cannot agree upon a single arbitrator to the decision of two arbitrators, of whom one shall be appointed by each of the parties in difference."

18. In *Samuel Kamau Macharia & Another vs KCB & 2 Others application No. 2 of 2011*, the Supreme Court pronounced itself as follows regarding the court's jurisdiction: -

> "a court's jurisdiction flows from either the Constitution or Legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the Constitution or both or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law."

19. Section 7 of the *Arbitration Act* empowers the court to issue appropriate reliefs in order to preserve the subject matter of an arbitration which includes an order directing parties to refrain from the doing or continuing the acts complained of pending the outcome of arbitral proceedings. The said section stipulates as follows:

(7) Interim measures by court

(1) It is not incompatible with an arbitration agreement for a party to request from the High Court, before or during arbitral proceedings, an interim measure of protection and for the High Court to grant that measure.

(2) Where a party applies to the High Court for an injunction or other interim order and the arbitral tribunal has already ruled on any matter relevant to the application, the High Court shall treat the ruling or any finding of fact made in the course of the ruling as conclusive for the purposes of the application.

20. Section 780 of the *Companies Act* 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.

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.

21. Section 782(1) and 2(a) and (b) of the *Companies Act*, on the other hand, provides that: -

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;

22. My understanding of the above provisions is that they do not provide that an application for protection against alleged oppressive conduct and unfair prejudice can only be made against a Company as was suggested by the respondents. Courts have taken the position that an application may be filed under section 780 of the *Companies Act* by a member of a company against a company and its directors/ shareholders for alleged acts of oppressive conduct and unfair proceedings. (See *John Muturi Nyaga v Graham Alexander Walsh & 3 others [2017] eKLR*).

23. In the instant case, I note that the 2nd and 3rd Respondents are the majority shareholders of the Company while the 2nd Respondent is the sole shareholder of the 3rd Respondent and also a shareholder of the 4th Respondent. The bone of contention in both the petition and application is the proposed allotment of the Company's shares to be made to the 3rd and 4th Respondents. The applicant argued that the 2nd, 3rd and 4th Respondents are necessary parties to the Injunction Application and the Petition, considering that any orders issued by the Court will directly affect them.

24. My finding is that the Court cannot at this interlocutory stage, consider and determine the merits of the applicant's claim against each of the respondents. This is however not to say that these are not proper proceedings under Section 780 of the *Companies Act* as the applicant has shown the basis for including the respondents to the proceedings.

25. Having regard to the different positions taken by the parties herein over whether or not their dispute is governed by the arbitral clause, I find that the same is a contested issue whose determination will require the exercise of judicial discretion, after receiving the evidence from the parties. I am therefore not satisfied that the issue of whether the parties are subject to the arbitral clause is a pure point of law to be resolved through the preliminary objection.

26. I further find that besides Section 7 of the *Arbitration Act*, the application was also brought under Sections 780 and 782 of the *Companies Act* which empower the court to issue appropriate reliefs in respect of the matters complained of. I am therefore not satisfied that the Preliminary Objection raises a pure points of law that are capable of dispensing with the application and Petition and I therefore dismiss it with costs.

Injunction

27. Turning to the prayers for injunction, the applicant seeks to restrain the 1st,2nd and 3rd Respondents from doing any of the following acts pending the institution and referral of the dispute between the Applicants and the Respondents to arbitration accordance with paragraph 44 of the Company's Articles of Association: -

    i. increasing the 1st Respondent's share capital or otherwise dealing with the shares of the 1st respondent,

    ii. registering any allotment or issuance or transfer of any shares in the 1st Respondent in favour of the 3rd and 4th Respondents or any other party without complying with the pre-emption provisions contained in the Articles of Association of the 1st Respondents and the *Companies Act*,

    iii. including the 1st Respondent's Board of Directors by themselves, their agent from participating in, or convening the meeting of 6 May, employees or anyone acting for them, from participation in or convening the meeting of 6th May 2021 and any other subsequent meetings, for purposes of consenting to the Applicant's removal as a director of the 1st Respondent as well as the allotment and issuance 2,575,705 ordinary shares to the 3rd Respondent and 1,200,000 ordinary shares to the 4th Respondent.

28. Under Section 7 of the *Arbitration Act*, an applicant can invoke the court's jurisdiction where there is an arbitration agreement and the subject matter of the intended arbitration is under threat. Under those circumstances the court will consider if the interim measures of protection in the nature of an injunction is an appropriate remedy.

29. In *Jung Bong Sue vs Afrikon Limited [2015] eKLR* the court considered an application under Section 7 of the *Arbitration Act* and held that: -

> " .....at this stage, the Court should not delve into the merits or demerits of the respective claims and/or counterclaim or to attempt to resolve this dispute. That is for the Arbitrator. What is required of this Court is to intervene under section 7 of the *Arbitration Act* and to give an interim measure of protection pending resolution of the dispute through Arbitration....."

30. In *Safaricom Ltd vs Ocean View Beach Hotel Limited & 2 others [2010] eKLR* it was held that: -

> " A court of law when asked to issue interim measures of protection must always be reluctant to make a decision that would risk prejudicing the outcome of the arbitration."

31. From the above cited cases it is clear that in an application brought under Section 7 of the *Arbitration Act* the court cannot intervene and consider the merits of the dispute or the validity of the arbitration agreement as those are matters that fall squarely within the purview of the arbitrator.

32. The principles applicable in an application founded on Section 7 of the Arbitration were discussed in Safaricom Ltd (supra) where the court observed that the principles governing the granting of orders of injunction as stated in the oft-cited case of *Giella v. Cassman Brown* do not apply. The Court pronounced itself as follows: -

> " .....With great respect to the superior court, although the right of intervention as specified in section 7 and the limit of intervention defined in the section, what happened is that the court misapprehended its role, declined to grant the interim measure by applying line, hook

and sinker the civil procedure preconditions for the grant of interlocutory injunctions as laid down in the celebrated case ofGiella vs Cassman Brown [1973] EA 358and also delved into the rights of parties whereas, under the provisions ofsection 7, there was no suit pending before it for determination because the interim measure of protection was being sought before the commencement of an intended arbitration.

By determining the matters on the basis of theGIELLAprinciples the superior court failed to appreciate what interim measures of protection entail in terms of arbitration law, during or before the commencement of arbitration. It may be necessary for an arbitral tribunal or a national court to issue orders intended to preserve evidence, to protect assets, or in some other way to maintain the status quo pending the outcome of the arbitration proceedings themselves. Such orders take different forms and go under different names. In the case of Kenya, the *Arbitration Act* is modelled on the Model Law and the UNCITRAL Rules and this is the reason they are known as "interim measures of protection" under section 7 of the *Arbitration Act*." (Emphasis supplied)

The court went on to hold that: -

''Interim measures of protection in arbitration take different forms and it would be unwise to regard the categories of interim measures as being in any sense closed (say restricted to injunctions for example) and what is suitable must turn or depend on the facts of each case before the court or the tribunal – such interim measures include, measures relating to the preservation of evidence, measures aimed at preserving the status quo, measures intended to provide security for costs and injunctions. Under our system of the law on arbitration, the essentials which the court must take into account before issuing the interim measures of protection are: -

a. The existence of an arbitration agreement.

b. Whether the subject matter of arbitration is under threat.

c. In the special circumstances which is the appropriate measure of protection after an assessment of the merits of the application.

d. For what period must the measure be given especially if requested for before the commencement of the arbitration so as to avoid encroaching on the tribunal's decision-making power as intended by the parties."

33. The gist of the applicant's case is with respect to the increase of the share capital for purposes of converting debts owed to the 3rd and 4th respondents to equity. The dispute revolves around the proposed basis for the valuation of the applicant's shares and the intention to allot and issue shares to non-shareholders. According to the applicant, the proposed valuation and allotment of shares by the respondents contravene the provisions of the *Companies Act*.

34. My finding is that while the rule in *Foss vs Harbottle (1843) 2 Hare 461* discourages courts from interfering with the running the affairs of the company except where the acts complained of are ultra vires, Sections 780 and 782 of the *Companies act* allow the courts' intervention where the affairs of the Company have been conducted in a manner that is oppressive or unfairly prejudicial.

35. In view of the foregoing and having noted that it is not disputed that a dispute arose between the parties with respect to the shareholding of the Company, I find that the arbitral clause in the Articles of association prefers that the disputes between the parties be referred to arbitration. On party autonomy, I find that the dispute should be referred to arbitration bearing in mind that the parties have a relationship wherein the 2nd respondent is a shareholder of the 3rd respondent. I further find that the

protection under Section 7 of the *Arbitration Act* is necessary in order to protect the subject matter of the arbitration.

36. I am guided by the decision in *Cetelem vs Roust Holdings (2005) EWCA* civ 618 where it was stated that: -

> " The whole purpose of giving the court power to make such orders is to assist the arbitral process in cases of urgency before there is arbitration on foot.... Of course, in any case where the court is called upon to exercise the power, it must take great care not to usurp the arbitral process and to ensure, by exacting appropriate undertaking from the claimant, that the substantive questions are reserved for the arbitrator or arbitrators
>
> Orders for the preservation of assets... can only be invoked (a) when "the case is one of urgency" and (b) when the judge thinks that it is "necessary" to make the order....

37. Similarly, *BABS Security Limited v Theothermal Development Limited [2014] eKLR* the Court had the following to say: -

> " A consensus seems to have emerged from the string of judicial authorities cited and which the Court is familiar with, that, if an injunction is sought as the interim relief under section 7 of the *Arbitration Act*, existence of an enforceable arbitration agreement constitutes prima facie case in the context of GIELLA v CASSMAN BROWN CASE. But, of course, that is not enough to grant interim relief by way of a temporary injunction as the Court will be obligated to consider all the other factors before it comes to a decision that the Applicant deserves an injunction as a measure of protection of the subject of the arbitral proceedings. The protection envisaged under the section is to ensure that the subject matter of the arbitral proceedings is not in any danger of being wasted or dissipated before the final decision by the arbitral tribunal is made on the matter. But the ultimate decision will depend on the peculiar circumstances of each case and matters such as; the nature of the contract to be preserved; the nature of and the potentiality of dissipation of the subject of the arbitral proceedings; and any other relevant factor attending the case will guide the decision of the Court in determining whether or not an order for interim protection should be made.

38. In sum, I find that the applicant has made out his case for grant of the orders sought in the application which I hereby allow with orders that costs shall abide the outcome of the arbitration.

Dated, signed and delivered via Microsoft Teams at Nairobi this 11th day of November 2021 in view of the declaration of measures restricting court operations due to Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on the 17 th April 2020.

W. A. OKWANY

JUDGE

In the presence of: -

Ms Macharia and Ms Amayo for the Applicant.

Mr. Wairoto for Respondent.

Court Assistant: Margaret.