



REPUBLIC OF KENYA



**Kithitu v Minazall & 10 others; Wanyoike & 2 others (Interested Parties) (Commercial Civil Case E759 of 2021) [2021] KEHC 385 (KLR) (Commercial and Tax) (15 December 2021) (Ruling)**

Neutral citation: [2021] KEHC 385 (KLR)

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)**  
**COMMERCIAL AND TAX**  
**COMMERCIAL CIVIL CASE E759 OF 2021**  
**DAS MAJANJA, J**  
**DECEMBER 15, 2021**

**BETWEEN**

**JOSEPH WAMBUA KITHITU ..... PLAINTIFF**

**AND**

**SHAZMIN MANJI MINAZALL ..... 1<sup>ST</sup> DEFENDANT**

**PAUL NGANGA ..... 2<sup>ND</sup> DEFENDANT**

**MIRA HEMAL BID ..... 3<sup>RD</sup> DEFENDANT**

**KHADIJA HUSSEIN ..... 4<sup>TH</sup> DEFENDANT**

**PATRICK NGOTHO ..... 5<sup>TH</sup> DEFENDANT**

**FRED ODEK ..... 6<sup>TH</sup> DEFENDANT**

**SHILENKUMAR JOBANPUTRA ..... 7<sup>TH</sup> DEFENDANT**

**RASHIDA PERREIRA ..... 8<sup>TH</sup> DEFENDANT**

**JULIE SCOTT ..... 9<sup>TH</sup> DEFENDANT**

**KENYA ASSOCIATION OF TRAVEL AGENTS LTD ..... 10<sup>TH</sup> DEFENDANT**

**IMPERIAL REGISTRARS LIMITED ..... 11<sup>TH</sup> DEFENDANT**

**AND**

**MOHAMMED WANYOIKE ..... INTERESTED PARTY**

**SHUKRI AHMED ..... INTERESTED PARTY**

**REGISTRAR OF COMPANIES ..... INTERESTED PARTY**



## RULING

1. Before the court for determination is the Plaintiff's Notice of Motion dated 18<sup>th</sup> March 2021 made, inter alia, under Order 51 Rule 1 of the [Civil Procedure Rules 2010](#), sections 1A and 3A of the [Civil Procedure Act](#) (Chapter 21 of the Laws of Kenya) seeking the following orders That:
  1. Spent\*
  2. Spent\*
  3. Spent\*
  4. Spent\*
  5. Spent\*
  6. Pending the hearing and determination of the intended suit on the disputed election of 7<sup>th</sup> August 2021, an injunction be issued restraining the defendants whether by themselves, their employees, directors, representatives and/or agents, from purporting to suspend, remove or appoint the Managing Director, the chairman of the board of directors, other officers, any director and/or employees of the first plaintiff or in any other manner whatsoever interfering with the directors and employees of the 9<sup>th</sup> Defendant, and any such purported suspension, removal or appointment of the Chief Executive Officer, the chairman of the board of directors, other officers, any director and/or employees of the 9<sup>th</sup> Defendant that have been done by the defendants be declared of no consequence.
  7. Pending the hearing and determination of the intended arbitral proceedings, an injunction be issued restraining the defendants whether by themselves, their employees, directors, officers, representatives and/or agents, from submitting the names of the defendants or any other person to the Interested Parties as appointees to hold any position whatsoever in the first plaintiff, and any such submission of names of purported appointees that has been made by the defendants be declared of no consequence and not to be acted Upon.
  8. Pending the hearing and determination of the intended suit on the disputed elections held on 7<sup>th</sup> August 2021, the interested parties, the outgoing board of Directors of the 9<sup>th</sup> Defendant led by the 1<sup>st</sup> Interested Party, Mohammed Wanyoike as the immediate outgoing chairman, be mandated to continue discharging the overall supervision on the affairs of the 10<sup>th</sup> Defendant until proper elections are conducted in manner reasonably accepted by the 10<sup>th</sup> Defendant's members
  9. The costs of this application be borne by the defendants.
2. The application is supported by the Plaintiff's affidavits sworn on 18<sup>th</sup> August 2021, 11<sup>th</sup> October 2021 and 1<sup>st</sup> November 2021 respectively. It is opposed by the 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> Defendants through the replying affidavit of the 1<sup>st</sup> Defendant sworn on 25<sup>th</sup> October 2021, the 2<sup>nd</sup> Defendant through his replying affidavit sworn on 2<sup>nd</sup> November 2021 and the 11<sup>th</sup> Defendant through the



replying affidavit of its Advocate who is also a certified company secretary, Beatrice Ngethe, sworn on 14<sup>th</sup> October 2021. The parties have also filed written submissions in support of their respective positions.

3. The facts giving rise to the application and the Plaintiff's grievance are common ground and can be gleaned from the pleadings and depositions. The 10<sup>th</sup> Defendant ("the Company"), is the main national umbrella body for about 140 licensed Travel Agencies licensed by the Government of Kenya and IATA (International Air Transport Association). On 14<sup>th</sup> July 2021, the Company sent notice of the Annual General Meeting ("AGM") to all members of the Company inviting them to a physical meeting that was to be held on 7<sup>th</sup> August 2021 at the Tamarind Tree Hotel. However, due to the Ministry of Health guidelines restricting physical meetings, the Company's secretariat amended the AGM notice inviting them to a virtual meeting on the same date.
4. One of the items on the agenda of the AGM was the election of a new Chairperson and directors of the Company. The Plaintiff was a candidate for the position of Chairperson. The election, which was presided over by the 11<sup>th</sup> Defendant ("the Company Secretary"), was held on the appointed date. The 1<sup>st</sup> to 9<sup>th</sup> Defendants were declared as the Company's newly elected officials. The Plaintiff narrowly lost to the 1<sup>st</sup> Defendant who was declared as the elected Chairperson. It is the outcome of this election that the Plaintiff is now challenging and forms the basis of his suit and instant application.

#### The Application

5. The Plaintiff complains that the election was conducted in an irregular manner and was neither fair nor transparent. He claims that the voting and the tallying of the votes for the position of Chairperson was unverified and unprocedural. He accuses the Company Secretary of condoning several irregularities; permitting members who were not fully paid up to participate, allowing manual voting and tallying of results when it was agreed that voting would be by secret ballot and manually adding 14 extra votes to the 1<sup>st</sup> Defendant's votes thus inflating the 1<sup>st</sup> Defendant's total of 38 votes as against the Plaintiff's 34 votes. He also accuses the Company of permitting members who had prior appointed proxies to still vote thus causing double voting. The Plaintiff further claims that the final results were not verified and signed off by the candidates' representatives. That the results tallying forms for the position of Chairperson were full of cancellations and additions thus it was impossible to practically understand how the final results were reached.
6. The Plaintiff states that despite the 1<sup>st</sup> interested party, who was the outgoing Chairperson, declaring the AGM adjourned and directing the Company Secretary to look into the alleged irregularities, the 1<sup>st</sup> Defendant, though a contestant in the disputed election/results, took over the control of the meeting and oversaw the deliberations after departure of the outgoing Chairperson along with a few members.
7. The Plaintiff contends that the Company Articles of Association do not provide for a mode of dispute resolution among its members and that some of the members including the 1<sup>st</sup> to 9<sup>th</sup> Defendants have declined to participate in any alternative dispute resolution meeting called by the Company Secretary on 16<sup>th</sup> August 2021. He further avers that this dispute threatens the existence of the Company as a going concern and without the court's intervention, it may disintegrate and collapse with devastating consequences including loss of jobs for its employees, loss on investments made by its shareholders and the cohesion that has existed among them for over 40 years.
8. The Plaintiff states that it is vital to preserve the subject matter of the dispute, being the management and control of the Company and to uphold the rights of the Plaintiff along with the Company's members to a fair administrative process including the elections. The Plaintiff submits that he together



with the disgruntled Company members risk suffering immense loss if the orders sought are not granted.

#### The Defendants' Reply

9. The Defendants oppose the application. They assert that the Company's membership is limited to companies and not individuals as the Plaintiff contends.
10. The Defendants gave an account of the events on election day. That the meeting started at approximately 9:30 am with a declaration of the proxies. Thereafter the normal AGM business was conducted without interruption with the last item on the Agenda being election of Chairperson and Directors. After the vacancies were declared, the Plaintiff and the 1<sup>st</sup> Defendant were given an opportunity to address the membership prior to the virtual election. Thereafter the Poll was projected for each member on their screens to vote by secret ballot for the Chairperson as they were all sitting at different venues. The poll was then removed after the allocated 10 minutes and there was a call for nominations for the Finance Director and the 2<sup>nd</sup> Defendant was elected unopposed.
11. Thereafter, the Directors' positions were declared and the next poll was brought up on each member's screen after the nominees had addressed the membership and there were 8 nominations for 5 directors as the 9<sup>th</sup> Defendant's position was not for election as the elections of directors of the Company are rotational. In sum, the Defendants explain that the Board is comprised of the Chairperson (who was up for election), the Finance Director (who came in unopposed) who is the 2<sup>nd</sup> Defendant, Director-Coast Liaison (unopposed) who is the 8<sup>th</sup> Defendant and 2 other Directors who were not up for election including the 9<sup>th</sup> Defendant.
12. The Defendants depone after the election of the directors was concluded, the meeting was adjourned to generate the results as for all the elections at the Company's offices at The Address, Waiyaki Way which was the Tally Center. The Defendants state that the following persons, agreed upon to oversee, the tally process were present at the Tally Centre; (i) Representatives of the Company Secretary; (ii) The CEO of the Company and her team (iii) David Kamau, the Plaintiff's representative; and (iv) Julie Scott, the 1<sup>st</sup> Defendant's representative. The while the tallying and verification process was being carried out by the Company Secretary and the representatives, the Plaintiff started sharing the results on the zoom chat with the members and discrediting the process before it had even been concluded. That the Company Secretary came back on line after about 1 hour 45 minutes and shared the Chairperson's results declaring the 1<sup>st</sup> Defendant as the winner.
13. The Defendants state that the Plaintiff attempted to discredit the election process and results prior to and after were being declared and thus causing unnecessary commotion. In order to try save the situation, the 1<sup>st</sup> Defendant offered to resign but the members rejected the offer. The Defendants further state that the 1<sup>st</sup> Interested Party attempted to shut down the meeting but did not get a proposer or a seconder despite asking for the same 3 times. He unilaterally closed the meeting and left the virtual platform duly followed by the Plaintiff whilst the rest of the members were still online. The Defendants explain that members urged the Company Secretary to continue declaring the results to bring this matter to a close and at no stage while the results were being declared by the Company Secretary did the 1<sup>st</sup> Defendant take control of the meeting. That once the Board members were all in place and the 1<sup>st</sup> Defendant having been duly declared the Chairperson with the other Directors, she closed the meeting.
14. The Company Secretary states that among the issues agreed upon by the Company's Board members were that the meeting would proceed virtually, that the online voting tally was not to be visible to members as they voted, that proxies were to be allowed at the AGM and they were to be received at the Company Secretary/Secretariat no more than 48hrs prior to the AGM, that each candidate nominated



for the position of the Chairperson was to appoint an agent/verification officer to be present for the tallying of results manually, that where a proxy was present and the member was also present in person, then the proxy vote was to be removed from the tally, that only votes from paid up members were to be considered, the winner was to be declared by simple majority and that registration was required prior to members getting a link to the meeting

15. The Company Secretary contends that she did a demonstration of a dry run of the election process and projected a mock poll for all the members present and shared the Election Guidelines with all the members of the Board during the meeting held on 4<sup>th</sup> August 2021. The Company Secretary received various proxies for those members who could not attend and on the election day, it took over conduct of the meeting at about 9.30 am, tabled the list of nominees and proxies prior to commencement of the AGM and it was approved. After conducting the regular AGM business, it read out the election regulations to the members present and gave the candidates 3 minutes to present their vision to the members.
16. The Company Secretary further states that the poll was projected on the screens for members to vote and members were given ten minutes to vote. She confirmed that at the end of the election, the Plaintiff received 34 votes against the 1<sup>st</sup> Defendant's 38 votes. She communicated the results of the elections to the Company CEO by a letter dated 7<sup>th</sup> August 2021.
17. The Company Secretary asserts that she conducted a free, transparent and fair election of the Board of Directors and denies that Plaintiff's allegations in total. She specifically denies that she added extra votes to the 1<sup>st</sup> Defendant as claimed and states that the Plaintiff received 33 votes from members who were present and 1 proxy vote and the 1<sup>st</sup> Defendant received 24 votes from the members present and 14 proxy votes.
18. The Company Secretary depones that at the point of tallying, the Plaintiff was represented by David Kamau as his verification officer while the 1<sup>st</sup> Defendant was represented by the 9<sup>th</sup> Defendant. That upon conducting the final tally and announcing the results, the Plaintiff and his verification officer disputed them and declined to sign off. She points out that from the final tally sheets, the results are discernable and can be understood, contrary to the assertions in the Plaintiff's deposition.

#### Analysis and Determination

19. The Plaintiff mainly seeks injunctive orders restraining the Defendants from taking up and assuming their elective positions in the Company. He further seeks orders to preserve the status quo where the immediate outgoing officials of the Company continue to discharge their duties pending hearing and determination of the suit.
20. It is not disputed that in order to succeed, the Plaintiff has to meet the conditions for grant of an interlocutory injunction set out in *Giella v Cassman Brown [1973] EA 348*. He must demonstrate that it has a prima facie case with a probability of success, demonstrate irreparable injury which cannot be compensated by an award of damages if a temporary injunction is not granted, and if the court is in doubt show that the balance of convenience is in his favour. In *Nguruman Limited v Jane Bonde Nielsen and 2 Others NRB CA Civil Appeal No. 77 of 2012 [2014] eKLR* the Court of Appeal clarified that the conditions are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. This means that if an applicant does not establish a prima facie case then irreparable injury and balance of convenience do not require consideration. On the other hand, if a prima facie case is established, then the court will consider the other conditions.
21. As to what constitutes a prima facie case, the Court of Appeal in *Mrao Ltd v First American Bank of Kenya Limited and 2 Others [2003] eKLR* explained that it is, "a case in which on the material



presented to the Court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party to call for an explanation or rebuttal from the latter.” In this case, the Plaintiff must establish that the election, more particularly between him and the 1<sup>st</sup> Defendant was not free, fair, transparent and/or regular.

22. Having considered the depositions and in particular, the Plaintiff’s grounds and the Defendants’ answers, I find that the Plaintiff has not established a prima facie case for a number of reasons. First, in as much as the Plaintiff has annexed a list of members who had not paid up, there is no evidence that the said members voted at the election. For instance, the Plaintiff has not annexed any evidence that indicates that Vijjalaxmi Popat for Travel Care Limited voted for the 1<sup>st</sup> Defendant or that Kiroshi Shah for Travellers Den Limited also voted for the 1<sup>st</sup> Defendant. There is also no evidence that one Anwar Amershi for Crown Tours & Car Hire Limited was allowed to vote through its proxy for the 1<sup>st</sup> Defendant as the proxy list annexed by the Plaintiff (“JWK 15”) indicates that the said company’s voting status as “ineligible”. There is also no evidence that Shilen Jobanputra and Lalit Jobanputra, members of Travel N Style Limited both logged in and voted virtually to the advantage of the 1<sup>st</sup> Defendant.
23. There is also no evidence that any of the members voted manually as claimed by the Plaintiff. The minutes of the Company’s meetings and the Virtual Election Guidelines indicate that the voting was to be virtual and not manual and that the same was to be by ‘secret ballot’ as it was not visible to members as they voted. There is no evidence to support the allegation that the Company Secretary irregularly and unfairly added 14 additional votes to the 1<sup>st</sup> Defendant and there is also no evidence of the proxies who voted together with their nominees so as to demonstrate double voting as claimed by the Plaintiff.
24. Although the Plaintiff and his representative declined to verify the tally, I do not agree that the results’ tallying forms were full of cancellations and additions thus it was impossible to practically understand how the final results came about as claimed by the Plaintiff. I have read the forms and they are legible and clear on their face. Further, the declaration of the results by the Company Secretary supports the same.
25. The totality of the Plaintiff’s case is based on allegations that are not backed up by demonstrable evidence so as to meet the threshold of a prima facie case. I am alive to the warning given by the Court of Appeal in Nguruman Case (Supra) where it was stated that:

We reiterate that in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right, which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The applicant need not establish title it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right, which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the applicant’s case is more likely than not to ultimately succeed.

26. Following the dicta in the Nguruman Limited Case (Supra), once an applicant fails to establish a prima facie case with a probability of success, the inquiry comes to an end. Even if I am to determine the other requirements for the grant of an injunction, I would still come to the same conclusion that the Plaintiff is not entitled to an injunction or the orders sought. The Plaintiff has not demonstrated that he will suffer irreparable injury incapable of being compensated by way of damages that will be occasioned on the Plaintiff as an individual. I did not hear any complaint regarding the election of the other office



holders who constitute the majority members of the Board of Directors and who would be capable of running the Company.

27. Flowing from the above point, the balance of convenience tilts in favour of the Company going on about with its activities in the absence of the controversy surrounding the election hanging over its affairs by way of a court injunction. The Company functioning with the newly elected officials in the interim is better for its stability and it is for this reason that I would decline the prayer allowing the outgoing officials carrying out the functions of the Company pending new elections.

Disposition

28. For the reasons I have set out above, I dismiss the Plaintiff's application dated 18<sup>th</sup> August 2021 with costs to the Defendants.

**DATED AND DELIVERED AT NAIROBI THIS 15<sup>TH</sup> DAY OF DECEMBER 2021.**

**D. S. MAJANJA**

**JUDGE**

Court Assistant: Mr M. Onyango.

Mr Mudao instructed by Mudao and Company Advocates for the Plaintiff.

Ms Janmohammed, SC instructed by Archer and Wilcock Advocates for the 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> Defendants.

Mr Thuita instructed by Guandar Thuita and Company Advocates for the 2<sup>nd</sup> Defendant.

Mr Anzala instructed by Henia, Anzala and Company Advocates for the 11<sup>th</sup> Defendant

