



**Zillow Limited & another v Alaska Limited & another (Petition E012 of 2020)
[2021] KEHC 328 (KLR) (Commercial and Tax) (10 December 2021) (Ruling)**

Neutral citation: [2021] KEHC 328 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
PETITION E012 OF 2020
DAS MAJANJA, J
DECEMBER 10, 2021
IN THE MATTER OF CRAVE LOUNGE LIMITED AND
IN THE MATTER OF THE COMPANIES ACT, 2015
AND
IN THE MATTER OF PROTECTION OF MEMBERS AGAINST
OPPRESSIVE CONDUCT AND PREJUDICIAL CONDUCT**

BETWEEN

ZILLOW LIMITED 1ST PETITIONER

LINDA BOSIBORI NYAKANGO 2ND PETITIONER

AND

ALASKA LIMITED 1ST RESPONDENT

DORCAS NYAWIRA GITONGA 2ND RESPONDENT

RULING

1. These proceedings concern the Crave Lounge Limited (“the Company”) in which the 1st Petitioner (“Zillow”) and the 1st Respondent (“Alaska”) are equal shareholders. The Company’s main business is operating a business known as “Crave Lounge”. In order to carry on this business, the Company acquired a lease for certain premises from the 2nd Respondent (“Dorcac”) situated on LR No. 209/37/366/7 (“the suit premises”) for a period of 5 years from 1st November 2019 to 30th October 2024.

Petitioners’ Case



2. The gravamen of the Petitioners' complaint is set out in the Petition dated 13th December 2020 and supported by the 2nd Petitioner's affidavit sworn on 22nd December 2020. Their case is that the business was running well and in accordance with the resolutions of the directions of the Board of Directors since its establishment until July 2020 when the 2nd Petitioner ("Linda") was taken ill. She was advised by her doctors to stay off her business in order to recuperate until advised otherwise. When she resumed her duties in November 2020 and visited the premises, she was shocked to find that the business had been changed to "Alaska Lounge". The structural designs, equipment, fittings for Crave Lounge had been completely modified to the extent that the business was substantially different. Her attempts to raise the issue of the overhaul of the business and to requisition a Special General meeting were rebuffed by the 1st Respondent to the extent that she was subjected to malicious arrest.
3. The Petitioners accuse Alaska of conducting the affairs of the Company in a manner that is oppressive and unfairly prejudicial to the interests of the Company's shareholders. They contend that the renaming of the Company's business from "Crave Lounge" to "Alaska Lounge" which is the 1st Respondent's name and which was done without a resolution of the Board of Directors is therefore unlawful and illegal. The Petitioners further accuse Alaska of purporting to terminate the lease over the suit premises without the authority of the Company. They aver that this action is not only unlawful but also amounts to an illegal takeover by a shareholder of the Company's business.
4. In essence, the Petitioners claim that Alaska's actions of substantially altering the business of the Company from Crave Lounge without the involvement of the other shareholders is not only prejudicial to the interests of the shareholders but also the Company. They also accuse the Alaska of breach of statutory and fiduciary duties to the Company by promoting another company to the detriment of the Company. In the circumstances, it seeks the following reliefs:
 - a. A declaration that the affairs of the Nominal Respondent have been conducted in a manner that is oppressive and unfairly prejudicial to the interests of the shareholders.
 - b. A declaration that the purported change of business name of "Crave Lounge" as agreed resolved by the Nominal Respondent to "Alaska Lounge" is null and void ab initio for being unsanctioned by the Board of the Nominal Respondent.
 - c. A declaration that the purported reorganization of the Crave Lounge, its features, fittings, decorations and installations and branding is null and void for being unsanctioned by the Board of the Nominal Respondent.
 - d. An injunction be hereby issued directing the 1st respondent, its agents, and or employees or any other persons from any further renaming Crave Lounge to Alaska Lounge without approval of the Board of the Nominal Respondent.
 - e. An injunction be issued restraining the 1st Respondent their servants, agents, employees or other parties through whom they may act from in any way interfering with the status of the nominal Respondent and further reorganization of the Crave Lounge, its features, fittings, decorations and installations and branding without any board resolution from the nominal respondent.
 - f. An injunction be issued restraining the 1st respondent either by themselves their servants, agents, employees, or other parties through whom they may



act from threatening, harassing, intimidating, publishing, posting, writing or otherwise conveying information meant to defame or malign the petitioner.

- g. A declaration that he purported termination of the lease dated 18th November 2019 between the Nominal respondent and the 2nd respondent by the 1st and 2nd respondent is null and void ab initio for being unsanctioned by the board of the nominal respondent.
- h. The costs of this suit and interest thereon until payment in full.
- i. Such other orders as the court may deem fit I the interests of justice.

Respondent's Case

- 5. The Petition is opposed through the Replying Affidavit of Moturi Ronald Ratemo ("Ratemo"), Alaska's Managing Director, sworn on 5th July 2021. The thrust of the deposition is that Linda did not run Crave Lounge. That is was her husband, Jones Bitange Nyamariga, who was the one who fell sick. He states that the Company ceased operations due to non-payment of rent and the lease was terminated by Dorcas. He also denies changing the business name from Crave Lounge to Alaska Lounge.
- 6. Ratemo depones that by a letter dated 23rd May 2020, Dorcas' agent wrote to the Company demanding KES. 1,450,000.00 rent arrears in default of which it would terminate the lease. On 16th June 2020, the agent wrote a letter to the Company terminating the lease. Ratemo then approached Dorcas who offered Alaska a lease of the suit premises on condition that as a director of the Company, he would clear all the outstanding rent owed to her by the Company. This understanding was reduced into a Settlement Agreement dated 7th July 2020 between Dorcas and Ratemo. He denies that the Company has a lease over the suit premises as it was terminated in June 2020 and that the late registration of the lease in favour of the Company is intended to deceive the court.
- 7. Ratemo further depones that the when the Company was incorporated, it did not have any capital hence Viable Deco Solutions Limited, in which he is a director, advanced the Company KES. 8.8 million which is yet to be repaid as the Company's business was struggling and it fell into rent default.

Issues for determination

- 8. In the course of the proceedings, I referred the matter to mediation. The Petitioners and Dorcas entered into a partial mediation agreement where Dorcas agreed that the lease between her and the Company was still valid and that she confirmed that she did not knowingly execute the subsequent lease over the suit premises. She affirmed that the only lease in existence was between her and the Company. It was also agreed that she be discharged from the proceedings.
- 9. The Petitioners and Alaska filed written submissions in which they reiterated the respective positions I have outlined above.
- 10. Turning to the applicable law, this petition is made under the provisions of section 780 of the Companies Act, 2015 ("the Companies Act") which provides, in part, as follows:

780 (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.

11. If the petitioner establishes that the affairs of the company are being conducted in an unfair and prejudicial manner, then the court may grant the reliefs set out in section 782 of the *Companies Act* as follows:

782(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;
 - (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.
- (3) Subsection (2) does not limit the general effect of subsection (1).
- (4) The company is entitled to be served with a copy of the application and to appear and be heard as respondent at the hearing of the application-

12. In *Velani & 6 others v Naran & 2 others* [2021] KEHC 75 (KLR), Mativo J., considered what amounts to oppressive and unfairly prejudicial conduct. As regards oppressive conduct, the learned judge held, and I agree with him, that it is conduct that is burdensome, harsh and wrongful, or which lacks of probity and fair dealing and in reference to the affairs of the company. The learned Judge explained that:

[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.

[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.

13. The test to be applied in determining what amounts to unfair prejudice is objective hence the petitioner need not to demonstrate that anyone acted in bad faith or with the intention of causing prejudice. I now turn to consider the substance of the application in light of the law as I have summarised above and the issues raised by the Petitioners for resolution.

Determination

14. The first issue raised by the Petitioners for determination is whether Alaska's lease agreement with Dorcas is valid owing to the lease in place between the Company and Dorcas which is expected to expire in 2024.

15. The substance of Zillow's case is that at the time material to this petition, Alaska ran the business without recourse to Zillow, represented by the 2nd Petitioner. During that time, the Petitioners accuse Alaska of terminating the lease to the suit premises and changing the Company business to the detriment of the Company and its shareholders. Apart from seeking a general declaration that Alaska's conduct is oppressive, the Petitioners seek prayers (b), (c), (d), (e) and (f) of the petition in relation to the suit premises. These reliefs, as I understand, are predicated on the mediation agreement between the Petitioners and Dorcas in which Dorcas disavowed her lease with Alaska over the suit premises. Dorcas asserts that the lease between her and the Company is still valid and in subsistence. The implication of this is that the Company should be able to continue with its business.

16. I agree with Alaska's submission that the lease to the suit property belonged to the Company and it is only the Company that can assert any right under it by filing suit to protect its proprietary interest. This is in accordance with the well-established principal in *Foss v Harbottle* [1843] 67 ER 189 that a wrong alleged to have been done to a company, can only be remedied by an action by the company itself. This principle is not embedded in the *Companies Act*. Zillow can only proceed with along this course by seeking permission to launch a derivative suit on the Company's behalf under section 238 of the *Companies Act*. I shall therefore not comment on the matter's validity or otherwise of the lease lest it becomes an issue in separate proceedings.

17. In any case, the Mediation Agreement between the Petitioners and Dorcas cannot bind or affect Alaska or any of its obligations with Dorcas as it is not a party thereto. There is also evidence that Dorcas not only entered into a Settlement Agreement with Alaska but also a lease for which she received consideration which she cannot wish away by entering into a consent in the absence of Alaska.



18. The next issue the Petitioners raise is whether there are valid resolutions sanctioning the changes made to the Company's business on the suit premises. On this issue, the evidence produced by Alaska is that the Company's lease was terminated by Dorcas through her agent on account of non-payment of rent. This was not a voluntary act by the Company itself but an act of a third party. While Dorcas, disavows the act of termination, she does not deny the fact that the termination was by her agent or that she entered into the Settlement Agreement with Ratemo to resolve the issue of outstanding rent paving way for Alaska to take over the premises. The Settlement Agreement with Ratemo makes her position in the Mediation Agreement untenable. I therefore hold that in the circumstances, resolution sanctioning the termination of the lease was not necessary as the lease was terminated by the landlord for breach.
19. The last issue framed by the petitioner is whether the actions of Alaska amount to oppressive and prejudicial conduct. The issue of oppression, unfair and prejudicial conduct has caused me some anxiety as this is a case where Zillow and Alaska are equal shareholders in the Company. This means that there is a deadlock in the management of the Company's affairs. However, a plain reading of section 780 of the Companies Act does not exclude a member of such a company petitioning the court for relief in an appropriate case where the facts of the case disclose conduct that warrants relief for example where one shareholder has actual control of the business.
20. I hold that the Petitioners have not made out a case for oppression and or unfair prejudice. This is a clear case of a deadlock between the shareholders and the only issue that would resolve the matter is for the parties to have a General Meeting. I agree with Alaska that the Company ceased to do business in June 2020. Such a business undertaking involves day to day engagement by the directors who, it appears, are not in good terms. It is also evident the Company has substantial liabilities. The business operation of the Company cannot be sustained by court orders for these reasons. The parties may therefore consider winding up the Company.

Disposition

21. Since the Petitioners have not made out a case for oppression and unfair prejudice, I am constrained to dismiss the application with costs to the 1st Respondent.

DATED AND DELIVERED AT NAIROBI THIS 10TH DAY OF DECEMBER 2021.

D. S. MAJANJA

JUDGE

Court Assistant: Mr M. Onyango.

Mr Manwa instructed by Otwal and Manwa Associates Advocates for the Petitioners.

Mr Kiiru instructed by Thuita Kiiru and Company Advocates for the 1st Respondent.

Mr Mola instructed by Mola, Kimosop and Njeru Advocates for the 2nd Respondent.

