



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & TAX DIVISION

HCCC NO. 5 OF 2019

MUKESH MEGHJI SHAH.....1ST PLAINTIFF

UMESH MEGHJI SHAH.....2ND PLAINTIFF

SUDHIR MEGHJI SHAH.....3RD PLAINTIFF

SUNIL MEGHJI SHAH.....4TH PLAINTIFF

(Suing for and on behalf of KARURA INVESTMENTS LIMITED)

VERSUS

SURESHCHANDRA RAICHAND SHAH.....1ST DEFENDANT

SOBHAGYACHAND VIDHU SHAH.....2ND DEFENDANT

VIPUL BABULAL SHAH

T/A BIASHARA REGISTRARS.....3RD DEFENDANT

DILESH BID.....INTERESTED PARTY

RULING

1. Part XXIX is a short but important part of the Companies Act No. 17 of 2015 (The Act). It provides for protection of members against oppressive conduct and unfair prejudice.

2. Whilst one of the reliefs that the Court can grant to protect a member of a company against oppressive conduct and unfair prejudice is to authorize civil proceedings to be brought in the name and on behalf of the company by the member, that order will only be made if the circumstances alleged to constitute oppressive and unfair conduct also reveal that the affairs of the company are in jeopardy or under threat. If the Court grants that relief, then the Court will have authorized the bringing of a derivative claim in the name of the company. Such a claim is by a member but in respect of a cause of action vested in the company and seeking relief on behalf of the company. A derivative action must relate to a cause of action that truly vests and belongs to the company and is not a device to urge reliefs against oppressive conduct and unfair prejudice to members.

3. It seems to this Court that this action, commenced by the Plaintiffs, is entirely for protection of their personal rights as members and does not vest or belong to the company. For that reason the entire substratum of the action is quicksand and so is the Notice of Motion dated 11th January 2019 for the following remaining prayers:-

5. THAT the Honourable Court does grant leave for the proposed Interested Party to be enjoined as an Interested Party in the suit.

7. THAT the Honourable Court be pleased to grant leave to the Plaintiffs to continue the instant suit as a derivative action on behalf of Karura Investments Limited.

8. THAT the Honourable Court be pleased to grant an order of temporary injunction restraining the Defendants, Company, and its members whether by itself, its board of directors, agents and or servants or whosoever from making any alterations and or amendments in its Memorandum of Articles of Association without leave of Court pending hearing and determination of the suit herein.

10. THAT indemnity be granted by the said Karura Investment Limited for all costs and expenses reasonably incurred in prosecuting this suit.

4. The Plaintiffs are shareholders of Karura Investments Limited (the Company) who, together, hold an aggregate of 117 shares out of 1000 issued shares in the company. They assert that their shares are fully paid up.

5. Through a letter of 19th February 2018 the Plaintiffs, together with one Chandrakant Meghji Shah, acknowledge owing the company loans plus interest of Kshs.1,149,850 each (Save for Mukesh who owed Kshs.1,189,500). By appending their signatures on the letter, the five members, further acknowledged that their respect shares were held by the company in lien for their respective debts.

6. The letter concludes:-

“We understand that you intend to pledge your aforesaid shares to Dilesh Bid for an amount of Kenya Shillings Four Hundred Million (Kshs.400,000,000/=) together with interest of Kenya Shillings Sixty Million (Kshs.60,000,000/=). Thus please note that the lien on the said shares ought not to exceed beyond the said amount being Kenya Shillings four hundred and sixty million (Kshs.460,000,000/=).”

7. The Plaintiffs complain that they have on several occasions forwarded cheques to settle the alleged debts but the 1st, 2nd and 3rd Defendants, who are directors and company secretary of the company respectively, have declined to receive them. Further, that the Defendants have refused to effect changes to their residential and postal address as requested.

8. There is then Dilesh Bid who is named in the proceedings as an interested party. It is said that the Plaintiffs collectively pledged their shares in the company to him. Consequently, on 1st March 2018, they wrote to the company requesting that all future dealings with their shares including issuance of bonus shares be deposited with the interested party due to the existing lien. The grouse by the Plaintiffs is that the Defendants have refused to effect those directions.

9. The Plaintiffs state that they issued separate notices dated 3rd October 2018 informing the company of their intention to sell their shares in the company and inviting any of the members to exercise their pre-emptive rights in that regard but this has not been acted upon.

10. The Plaintiffs are also apprehensive that the Defendants intend to amend the Memorandum and Articles of Association of the company in a manner that will prejudice their rights. That it was clearly manifested in the Notice for an Annual General Meeting that was scheduled for 19th January 2019.

11. In the end the Plaintiffs seek the following prayers:-

a) A declaration that the 1st, 2nd, and 3rd Defendants are in breach of their statutory duty to act in good faith and promote the success of the company.

b) A declaration that the acts of 1st, 2nd and 3rd Defendants amounts to oppressive conduct on the Plaintiffs being minority shareholders in the company.

c) A declaration that the acts of 1st, 2nd and 3rd Defendants are unfairly prejudicial to the Plaintiffs rights as majority shareholders of the company.

d) General damages for breach of trust and statutory duties.

e) An order directing that the Defendants duly acknowledge and register the pledge created on the Plaintiffs shares in favour of the interested party.

f) An order directing the Defendants to forthwith issue notices for sale of Plaintiffs' shares to members in accordance with the company's Articles of Association.

g) In the alternative to prayers (e) and (f), an order directing the Defendants to enter into the Register of Members the Interested Party as the bona fide beneficial owner of all the shares cumulatively held by the Plaintiffs in the company.

h) An order directing the Directors to forthwith abide by procedures set out in the company's Articles of Association and comply with all statutory duties set out under the company's Act.

i) Costs of the suit.

j) Interest in (d) and (i) above at Court rates from the date of Judgment until payment in full.

k) Any other relief that the Honourable Court would deem fit to grant.

12. I have to agree with counsel for the Defendants that the Plaintiffs have failed to disclose a case for giving permission. The true intention grievance of the Plaintiffs reveals itself in paragraph 27 of the Plaint.

“Despite the Plaintiffs making demands upon the Defendants, the Defendants have neglected and/or refused to accede to facilitate the sale of their shares.”

13. The Plaintiffs state that they intend to sell their shares to the Interested Party but have been frustrated because the Directors have failed to effectuate the pre-emption provisions of the Company’s Articles. In this regard Article 13 provides:-

“(13) Except where the sale or transfer is made pursuant to clause 12 hereof and except as hereinafter provided, no shares in the company shall be transferred unless and until the rights of pre-emption herein conferred shall have been exhausted:-

a) Every member or other person referred to in Clause 30 of the Table “A” who intends to transfer shares (herein called the “vendor”) shall give notice in writing to the board his agent for the sale of the said shares in one or more lots at the discretion of the board members of the company at a price to be agreed upon by the vendor and the board, or, in the case of difference, at the price which the auditor of the company for the time being shall certify, the writing under his hand, to be in his opinion the fair selling value thereof as between a willing vendor and a willing purchaser.

b) Upon the price being fixed as aforesaid the board shall forthwith give notice to all members of the company of the number and price of the shares to be sold and invite each of them to state in writing within twenty-one days from the date of the said notice whether he is willing to purchase any, and if so, what maximum number of the said shares.

c) At the expiration of the said twenty-one days the board shall allocate the said shares to or amongst the member or members who have expressed his or their willingness to purchase as aforesaid, and (if more than one) so far as may be pro rata according to the number of shares already held by them respectively, provided that no member shall be obliged to take more than the said maximum number of shares so notified by him as aforesaid. Upon such allocation being made the vendor shall be bound on payment of the said price to transfer the shares to the purchaser or purchasers. If he makes default in so doing, the chairman for the time being of the directors of the company or failing him one of the directors duly nominated by resolution of the board for the purpose shall forthwith be deemed to be duly appointed attorney of the vendor with full power to execute complete and deliver in the name and on behalf of the vendor a transfer of the shares to the purchasing member and the board may receive an give good discharge for the purchase money on behalf of the vendor and enter the name of the purchaser in the register of members as holder by transfer of the said shares purchased by him.

d) In the event the whole of the said shares not being sold under clause (a) hereof the vendor may at any time within three months after the expiration of the said twenty-one days transfer the said shares not so sold to any person (subject to clause II herein) and at any price.”

14. The nature of the grievance is personal to the members and is not one that hurts the company. The cause of action is not brought for the benefit of the company.

15. Indeed, the submissions by the Plaintiffs’ counsel betray the true nature of these proceedings. Counsel submits that the applicable law as Sections 780 & 782 of the Companies Act. These are provisions in respect to applications brought to protect members against oppressive conduct and unfair prejudice.

16. So what orders is this Court to make? Section 239 (4) of the Act provides:-

“(4) On hearing the application, the Court may—

(a) give permission to continue the claim on such terms as it considers appropriate;

(b) refuse permission and dismiss the claim; or

(c) adjourn the proceedings on the application and give such directions as it considers appropriate.”

17. It may well be that the Plaintiffs have well founded complaints against the company or its directors and are entitled to bring an action but in their personal names. So I have reflected whether, while declining permission to continue the claim, I can direct that the claim continues as a personal action. I have, however, come to the conclusion that the wide power granted to this Court by Section 239 4 (c) to give such direction as it considers appropriate can only be invoked if the claim itself is *prima facie* a derivative claim. That, in the face of it, the claim is one in respect of a cause of action vested in the company and seeking relief on behalf of the company.

18. Having refused permission, then the Court must dismiss the claim. The Chamber Summons of 11th January 2019 fails and the Plaintiffs’ claim presented in the Plaint dated 11th January 2019 is dismissed with costs.

Dated, Signed and Delivered in Court at Nairobi this 3rd Day of January 2020

F. TUIYOTT

JUDGE

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 17th April 2020, this Ruling has been delivered to the parties through virtual platform.

F. TUIYOTT

JUDGE

PRESENT:

Ms Gicheru for Plaintiffs.

Mr Mwangi for Defendants.

Mr Issa for Interested Party