



THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL & TAX DIVISION

CIVIL CASE NO. E 364 OF 2019

MOHAMED JELLE OMAR.....1ST PLAINTIFF/RESPONDENT

ABDIWELI ADAN KALIC.....2ND PLAINTIFF/RESPONDENT

(SUING FOR AND ON BEHALF OF TOTAL QUALITY HALAL CORRECT LIMITED)

-VERSUS-

ALI SALAL.....1ST DEFENDANT/APPLICANT

SALEM NAJEM MUBARAK.....2ND DEFENDANT/APPLICANT

RULING

The Plaintiffs' Advocates filed Certificate of Urgency Application dated 16th October 2019 and urged the court to be heard on a priority basis on grounds;

- a) That both the 1st and 2nd Defendants are foreigners – 1st Defendant is a national of the Netherlands and 2nd Defendant is a national of United Arab Emirates and both are also directors/shareholders of the Company, each holding 333 shares (total 666 shares) of the company;
- b) That the Defendants are the only signatories of two (2) Account numbers 0014674601 and 0014674602 operated by the Company at the Eastleigh Garage Branch of first Community Bank (hereinafter referred as the "Bank Accounts"). Since inception of the Company's business, the Defendants have mischievously excluded the Plaintiffs from operation of the Bank Accounts without disclosure or giving accounts of the Company's funds and affairs.
- c) That the Defendants flew into the country from abroad on or about 8th October 2019 but despite the 2nd Plaintiff requesting for a Board of Directors/Company meeting to discuss Company affairs vide the 2nd Plaintiff's Advocate's letters dated 8th October 2019 and 14th October 2019, the Defendants have refused to respond to the 2nd Plaintiff's request or heed the demand therein.

NOTICE OF MOTION DATED 16 OCTOBER 2019

The certificate of urgency was filed together with a Notice of Motion Application dated 16th October 2019, under the provisions of **Section 1A, 1B, 3A and 63(e) of the Civil Procedure Act, Order 40 of the Civil procedure Rules 2010, section 238 (3), (4), (6), 239 (1) (3) (4), 780 (1) (2), 782, 140,143, 146, 148, 150 (6) of the Companies Act** and all other enabling provisions of law. The Applicant sought orders;

- a) That in the alternative to application being certified urgent and heard *ex-parte* in the first instance pending *inter-partes* hearing of this application, an order be issued restraining the 1st and 2nd Defendants whether by themselves, agents, servants or otherwise howsoever from accessing and operating accounts numbers 0014674601 and 0014674602 operated by Total Quality Halal Correct Limited at the Eastleigh Garage Branch of First Community Bank or any other bank account operated by the Company without the express consent or concurrence of the 2nd Plaintiff.
- b) That pending *inter-partes* hearing of this application an order be issued restraining the 1st and 2nd Defendants whether by themselves, agents servants or otherwise howsoever from taking and making decisions, giving instructions, writing and signing

letters, notices, forms, deeds, minutes, resolutions, returns and any other documents in the name of and/or on behalf of Total Quality Halal Correct Limited without the consent and concurrence of the 2nd Plaintiff.

c) That the Court grants leave to the Plaintiffs to continue the instant suit as a derivative action.

d) That an order be issued compelling the 1st and 2nd Defendants to render a true and accurate account of all books of account of Total Quality Halal Correct Limited, including profits made by the said company from the date of incorporation to date.

e) That an order be issued compelling 1st and 2nd Defendant and the Company to pay the 2nd Plaintiff all accrued dividends on his shares from the profits earned by Total Quality Halal Correct Limited from the date of incorporation to date.

f) That an order be issued restraining the 1st and 2nd Defendants whether by themselves, agents, servants or otherwise howsoever from taking and making decisions, giving instructions, writing and signing letters, notices, forms, deeds, minutes, resolutions, returns and any other documents in the name of and/or on behalf of Total Quality Halal Correct Limited without the consent and concurrence of the 2nd Plaintiff.

REPLYING AFFIDAVIT

The application was opposed vide an affidavit dated 22nd October 2019, sworn by Salem Najem Mubarak (herein “**the 2nd Defendant**”) one of Directors and CEO of Total Quality Halal Correct Limited. He stated that he had authority to swear affidavit on behalf of the 1st Defendant. He deposed that they came to Kenya with a view to invest and while incorporating the company in 2017; they allocated 333 shares to Mohammed Jelle Omar (herein “**the 1st Plaintiff**”) who is a Kenyan on condition that he was to make his contribution of 40,000 USD to enable him share profits and losses.

He stated that at the incorporation of the company there were three directors;

1. Mr. Sale Mubarak (United Arab Emirates) holding 333 ordinary shares
2. Mr. Abdilfatah Ali Salah (Netherlands) holding 333 ordinary shares.
3. Mr. Mohammed Jelle Omar(Kenya) holding 333 ordinary shares

He averred that it was agreed and decided by all shareholders that they will equally contribute towards the capital and marketing of the company.

He deposed that 1st Plaintiff Mohammed Jelle Omar failed to make any contributions towards the operations of the company.

Further, that 1st Plaintiff was reminded several times to contribute but he ignored and did not respond to letter (s) addressed to him.

He asserted that the issue of non-compliance by the 1st Plaintiff was discussed and Mr. Mohammed Jelle Omar was given three options;

- a) To pay USD 40,000/- as his capital contribution ($\frac{1}{3}$ of the Company’s one year expenses; as compensation for his failure to contribute after the company’s incorporation and also goodwill price for 1 year’s operations).
- b) Reduction in percentage of shares and continues as a sleeping partner.
- c) Fixed annual amount for his name in the company with no involvement in the company’s operations.

The defendants came to Kenya in October 2019 and claimed they were ambushed to attend a meeting with the 2nd Plaintiff who was a stranger to the Company through a letter by his advocate on record.

After the 1st Plaintiff failed to deposit the USD 40,000 as agreed and he forfeited the shares to the Company as per letter annexed and marked as **SNM2**. Therefore , he had no capacity to transfer shares to anybody else as alleged that he transferred shares to the 2nd Plaintiff which was/is contrary to the Memorandum and Articles of Association.

NOTICE OF MOTION DATED 24TH OCTOBER 2019

By a Notice of Motion application dated 24th October 2019, by the Defendants, filed pursuant to **Order 45 Rule of the Civil Procedure Rules 2010, section 1A, 1B and 3A of the Civil Procedure Act** and all other enabling provisions of the law. The Applicants/Defendants sought orders:

- a) That this Court stays and/or vacates *ex parte* orders issued on 18th October 2019 that the Company accounts are frozen and all other consequential orders until the hearing and determination of this application.

b) That the Applicants are granted an order to access and operate account numbers 0014674601 and 14674602 operated by Total Quality Halal Correct Limited pending *inter-partes* hearing of the application.

The Defendants/Applicants grounded their application on the following facts;

- a) The *ex parte* order to freeze accounts granted on 18th October 2019 was prejudicial as it paralyzed operations of the Company and the Company incurred severe losses and damage
- b) The Plaintiffs are strangers to the Company; the Defendants are the only Directors of the Company.

FURTHER & REPLYING AFFIDAVIT(S)

The 1st Plaintiff filed and served Further Affidavit in response to Respondent's Replying Affidavit on 21st November 2019 and also filed Replying Affidavit to the application of 24th October 2019 and in a nutshell deposed;

In 2017 the 2nd Plaintiff/Respondent Abdiweli Adan Kalicha, on behalf of Meat & Livestock Exporters Industry Council of Kenya- (Ke MLEIC) invited Applicants/Defendants and one Amer Saad Hamad Almahri to visit Kenya and discuss prospects of exportation of meat to the United Arab Emirates (UAE). This was confirmed by letter of 1st August 2017 signed by 2nd Respondent.

On 24th August 2017, the parties incorporated Total quality Halal Correct Limited as per **CR 12** annexed and marked **MJO3**. The directors were;

- a) Amer Saad Hamad Almahri (UAE)- 333 ordinary shares
- b) Ali Salah- 1st Defendant (Netherlands)- 333 ordinary shares
- c) Mohammed Jelle Omar -1st Plaintiff (Kenyan)- 333 ordinary shares.

The 2nd Plaintiff/Respondent housed the new Company in his office at Hughes Building Banda Street and later got the Company an office in Ngara. The 2nd Plaintiff/Respondent also purchased furniture and equipment for the Company. The 1st Plaintiff held 333 shares for 2nd Respondent; who at the time of incorporation of the Company was actively involved in exportation of meat in the UAE. So to avoid possible conflict of interest during inspection of meat and export licencing process the 2nd Respondent was not to be involved.

Later, Amer Saad Hamad Almahri transferred his shares to the 2nd Applicant/Defendant –Salem Najem Mubarak. This was contrary to the Articles of Association of the Company and Companies Act, 2015. No directors' meeting was held to consult and/or agree on the transfer of shares and/or appointment of the 2nd Applicant/Defendant as Director of the Company.

The 1st Plaintiff contended that the 2 Applicant/Respondents colluded and ousted the 1st Plaintiff out of the Company; he was/is not a signatory to the Company accounts, did/does not share profits/dividends and did/does not participate in operations and management of the Company nor engage in any decision making process of the Company.

The 1st Plaintiff further claimed that the demand of his contribution of **USD 40,000** to capitalize the Company was discriminatory and an afterthought calculated to coerce him to abandon being one of the Directors of the Company and forfeit lawful profits /dividends.

The 1st Plaintiff confirmed that he wrote to the Defendants/Applicants to exercise preemptive rights and buy his shares vide letter dated 26th February 2019 annexed and marked **MJO4** to the Affidavit.

On 30th September 2019, the 1st Plaintiff was coerced by the Defendants' /directors and he resigned as Director of the Company by transferring 333 shares to the 2nd Respondent/2nd Plaintiff who was the ultimate beneficiary thereof. This is evidenced by a letter dated 30th September 2019 annexed and marked **MJO5** to the Affidavit.

Pursuant; to the Court Order of 4th December 2019, that the Defendants continue to run Company accounts pending hearing and determination of the matter to ensure the Company remains a going concern, it is alleged that the Defendants/Respondents have been operating the Company business on cash basis and no funds are banked in the said accounts

DETERMINATION

Counsel for parties made oral submissions largely focused on pleadings filed by their respective parties. After consideration, the issues that emerge for determination are;

- a. Who are the Directors of Total Quality Halal Correct Limited?
- b. Whether the Defendants/Directors should be restrained from operating the Company Accounts and operating and managing the Company without the concurrence and/or consent of the 2nd Plaintiff.

c. Whether the instant suit is a derivative suit and/or leave should be granted to allow the Plaintiff prosecute the suit for and against the Company.

ANALYSIS

LAW

Section 139 Companies Act- Resolution to remove directors from office

- (1) *A company may, by ordinary resolution at a meeting, remove a director before the end of the director's period of office, despite anything to the contrary in any agreement between the company and the director.*
- (2) *However, a special notice is required for a resolution to remove a director under this section or to appoint a person to replace the director so removed at the meeting at which the director is removed.*

Section 140 Companies Act- Directors' Duties- Scope and nature of general duties

- (1) *The general duties specified in this Division are owed by a director of a company to the company.*
- (2) *A person who ceases to be a director continues to be subject to—*
 - (a) *the duty in section 146 with respect to the exploitation of any property, information or opportunity of which the person became aware while a director; and*
 - (b) *the duty in section 147 with respect to things done or omitted by the person before ceasing to be a director, and to that extent those duties apply to a former director as they do to a director.*

Section 141 Companies Act- Director's right to protest against removal;

- (1) *On receipt of notice of a motion for a resolution to remove a director under section 139, the company shall send a copy of the notice to the director concerned.*
- (2) *The director, whether or not a member of the company may be heard on the discussion of the motion at the meeting.*

Section 142 Companies Act- Duty of director to act within powers. A director of a company shall—

- (a) *act in accordance with the constitution of the company; and*
- (b) *only exercise powers for the purposes for which they are conferred.*

The Memorandum of Association of the Company prescribes members of the Company as 1st Plaintiff/Applicant Mohamed Jelle Omar -333 shares; Ali Salah Abdelfatteh- 1st Defendant/Respondent – 333 shares and Salem Mubarak Najem Saeed Aljineibi- 333 Shares as at 24th August 2017. Yet on the same date, the **CR-12** an official document processed from the Companies Registry upon information from the Company; annexed as **MJO3** to the 1st Plaintiff's affidavit confirms Directors of Total Quality Halal Correct Limited as Amer Saad Hamad Almahri (**UAE**) 333 shares; Ali Salah (**Netherlands**) 333 shares and Mohammed Jelle (Kenyan) 333 shares. Salem Mubarak Najem Saeed Aljineibi does not feature in this **CR-12** contrary to the Memorandum of Association. There is no evidence on record of minutes of members/shareholders/directors meeting of change of director(s), that Plaintiff's were invited to be heard or removed from the Board; a passed resolution of transfer of 333 shares of Amer Saad Hamad Almahri to Salem Najem Mubarak as director. There is also no evidence to show that there was nomination of Salem Najem Mubarak in writing to the Company to represent Amer Saad Hamad Almahri as required by **Section 114 of Companies Act**. There is also no evidence of Appointment of Salem Najem Mubarak as proxy of Amer Saad Hamad Almahri as required by **Section 114 Companies Act 2015**. Therefore, the entry of Salem Najem Mubarak as director of Total Quality Halal Correct Limited in the **CR -12** of 7th October 2019 was/is irregular, invalid and illegal and was/is based on misrepresentation to the Companies Registry by the 2nd Defendant. In the absence of a resolution, minutes of directors meeting, nomination or appointment of proxy document, the Company and directors acted contrary to **Clause 9 (f) of the Articles of Association and Section 142 Companies Act 2015**.

If the process of passing of shares from one Director to another is not regularized or ratified by Directors, then the Directors of Total Quality Halal Correct Limited remain as prescribed by the Memorandum of Association 1st Plaintiff/Applicant Mohamed Jelle Omar -333 shares; Ali Salah Abdelfatteh- 1st Defendant/Respondent – 333 shares and Salem Mubarak Najem Saeed Aljineibi- 333 Shares as at 24th August 2017. Both the 2nd Defendant and 2nd Plaintiff may not participate in operations and/or management of the Company unless appointed as proxy or nominee of the Director(s) in writing to the Company or by resolution of existing Directors authorizing sale and transfer of shares as prescribed under the Articles of Association and/or Companies Act.

329. Power of directors to allot shares etc: authorisation by company

- (1) *The directors of a company may exercise a power of the company—*

(a) to allot shares in the company; or

(b) to grant rights to subscribe for or to convert any security into shares in the company, only if they are authorised to do so by the company's articles or by a resolution of the company.

The Defendants vide Replying Affidavit filed on 24th October 2019 deponed in paragraphs 9, 11, 12, 13 & 14 as follows;

That it was agreed and decided by all shareholders that they will equally contribute towards the capital and marketing of the Company.

That the Directors Ali Salah & Salem Najem Mubarak made their contributions, established office and employed workers.

That the 1st Plaintiff was reminded several times to contribute but ignored and did not respond to letters addressed to him.

On 20th September 2018, the Company held its Board meeting where all directors attended and also the Accountant from UAE office Atif Zaheer Ahmad & Mr Hussain Mukhtear Haji Mohammed Office Manager (Kenya)

That the issue of non compliance by the 1st Plaintiff was discussed and Mr Jelle Omar was given 3 options; to pay USD 40,000 as his capital contribution, reduction in percentage of shares and continues as sleeping partner or fixed annual amount for his name in the Company with no involvement in the Company's operations.

To the above outlined claims, this Court observed as follows;

- a) There are no Minutes of Directors Meeting (s) where ALL directors discussed and agreed to pay USD 40,000 each director to capitalize the Company
- b) There is no resolution to approve or authorize Directors to allot shares under Section 329 of Companies Act
- c) There is no evidence that the shares issued at the incorporation of the Company were valued at USD 40,000 for each of 333 shares was allotted to each director.
- d) There is no evidence of called up shares as per Clause 6 of the Articles of Association of the Company.
- e) No documentary evidence of payment of USD 40,000 by each of the other Directors of the Company was presented/produced so as to compel similar payment from the 1st Plaintiff.
- f) The 1st Plaintiff held shares on behalf of 2nd Plaintiff who invited the Defendants to invest in Kenya. The 2nd Plaintiff accommodated the Company in his offices at Hughes Building and later secured the office in Ngara. He purchased furniture and equipment. These facts were not controverted by the Defendants. If so what was the value of the 2nd Plaintiff's uncontested contribution to the Company?

From the above observations, the Defendants lacked legal basis to unilaterally determine and demand **USD 40,000** from the 1st Plaintiff contrary to the Company's Constitution and **Companies Act 2015**. It was wrong to oust the 1st Plaintiff from membership, shareholding and/or directorship of the Company. The 1st Plaintiff ought to have remained Director of the Company. Instead, due to pressure from the other directors who ousted him from management of the company, he resigned as Director and signed transfer form and transferred 333 shares to the 2nd Plaintiff. The 2nd Plaintiff was declared a stranger to the Company by the 1st and 2nd Defendants, yet he came on board as Director just like the 2nd Defendant joined the Company; irregularly.

From the facts deponed by parties and documents relied upon, the Court finds that the entry of 2nd Defendant as Director was/is irregular just as the entry of the 2nd Plaintiff as Director of the Company. This is because the process of transfer of shares was contrary to **Articles of Association of the Company; Clause 9 (f)** which reads;

“Notwithstanding the foregoing sub clause of this Article, a transfer of shares in the Company maybe made to any person at any price or for any or no consideration provided that ALL members agree thereto in writing.”

The 1st Plaintiff, signed share transfer form; transferring 333 shares to 2nd Plaintiff without written approval from ALL members/shareholders of the Company. The 1st plaintiff swore an affidavit and wrote a resignation letter. The Defendants claimed that the 1st Plaintiff surrendered/forfeited shares back to the Company as the 2nd Plaintiff was/is a stranger to the Company. The Court perused through the Articles of Association of the Company and found by virtue of **Clause 11**;

“if the requirement of any notice issued pursuant to Regulations 33 and 34 of part I of Table “A” any share in respect of which such notice has been given may, at any time thereafter, before the payment of all calls or instalments, interests and expenses required by the notice has been made, be forfeited by a resolution of the directors to that effect. Such forfeiture shall include all dividends declared in respect of the forfeited share and not actually pad before the forfeiture. Regulations 35 of Part I of Table “A” shall not apply.”

That forfeiture of shares to the Company would be based on notice of call up of shares and a resolution of Directors; in this case these were not availed to this court. Hence the forfeiture of shares was/is not legally effected.

Secondly, the removal of the 1st Plaintiff was not in terms of **Section 139 of Companies Act 2015**. There was no resolution shown to this Court nor the prescribed special notice issued pursuant to the meeting held on 20th September 2018.

From the totality of the evidence; the Directors of the Total Quality Halal Correct Limited remain as prescribed by the Memorandum of Association 1st Plaintiff/Applicant Mohamed Jelle Omar -333 shares; Ali Salah Abdelfatteh- 1st Defendant/Respondent – 333 shares and Salem Mubarak Najem Saeed Aljineibi- 333 Shares as at 24th August 2017.

Whether the Defendants/Directors should be restrained from operating the Company Accounts and operating and managing the Company without the concurrence and/or consent of the 2nd Plaintiff.

On 17th October 2019, this Court granted *ex parte* interim orders restraining the Defendants from operating the Company Accounts. By virtue of the Defendant/Applicant's application filed on 24th October 2019, seeking to vary, amend or vacate the *ex parte* orders of 17th October 2019, the Court varied the same to allow the Defendants operate Company Accounts. This was pending hearing and determination of the dispute, this court granted release of Ksh 4 million to pay expenses overheads and salaries and to file monthly reports. Plaintiffs deponed that the Defendants have resulted to trading in cash, so that no money is banked and accounted for. The orders were granted to ensure the Company continues to operate as a going concern and to carry out its objective, issue inspection certificates for meat exports. From the above outline this prayer is overtaken by events and would not be considered as the Court cannot act in vain.

In the instant suit is a derivative suit and/or leave should be granted to allow the Plaintiff prosecute the suit for and against the Company.

In *Ghelani Metals Limited & 3 Others vs Elesh Ghelani Natwarlal & Registrar of Companies HCCC 102 of 2017 Onguto J held;*

“Derivative actions are pillars of corporate litigation. A derivative action is a mechanism which allows shareholder(s) to litigate on behalf of the Corporation often against an insider (whether a director, majority shareholder or other officer) of a 3rd Party, whose action allegedly injured the Corporation. The action is designed as a tool of accountability to ensure redress is obtained against all wrong doers, in the form of a representative suit filed by a shareholder on behalf of the Corporation.”

A reading of Section 238 (3) Companies Act grants the member the opportunity to seek relief on behalf of the Company in respect of ‘cause of action arising from actual or proposed act or omission involving negligence, default, breach of duty or breach of trust by a director of the Company.’

In the instant case, the ouster of 1st Plaintiff as member/shareholder /director of the Company was contrary to **Section 139 of Companies Act**. The Defendants refused to acknowledge 1st Plaintiff's transfer of shares to 2nd Plaintiff yet they did not question/oppose a similar transfer of shares without consultation and approval of all directors from Amer Saad Hamad Almahri to Salem Najem Mubarak. The removal of 1st Plaintiff as Director of the Company through coercion by invoking nonpayment of **USD 40,000** and refusal of the 2nd Plaintiff meant that the Company's management and operations were/are hampered as the Company is not run by the Board of Directors but by some Directors of the Company contrary to its Constitution and Companies Act.

See *PeterO.Ngoge T/a OP Ngoge & Associates vs Ammu Investment Company[2012]eKLR; it was observed;*

“The general law however, is that a Corporation is an artificial legal entity. It must of necessity act through its agents, usually the Board of Directors. In other words the Corporation's Board of Directors who make decisions on behalf of the Company.”

The Plaintiffs have established a *prima facie* case and are granted leave to continue with the suit as a derivative suit with the Company as a Co –defendant.

DISPOSITION

The Court finds merit in the Plaintiffs/Applicants application of 16th October 2019 in the following terms;

- 1) The 1st Plaintiff Mohammed Jelle Omar is reinstated as Director of the Company forthwith as his removal was contrary to Section 139 of Companies Act and Memorandum and Articles of Association of the Company.
- 2) The 1st Plaintiff shall forthwith be entered as Co signatory to the Company accounts 0014674601 & 0014674602 of Total Quality Halal Correct Limited First Community bank Eastleigh Garage Branch and any other Company Account(s)
- 3) The 1st Plaintiff shall forthwith be granted access to the Company's office(s) and be availed the Company financial statements and accounts as other Directors.
- 4) The 1st Plaintiff shall forthwith attend and participate in Directors Board meetings of the Company and participate in the management and operations of the Company as other Directors of the Company.

- 5) The 1st Plaintiff shall be paid forthwith all profits/ dividends/allowances due and owing pending since the illegal ouster from the Company.
- 6) In default, the Registrar of Companies shall step in as Inspector by virtue of Section 780 & 782 of the Companies Act and on inspection provide a report to Court within 30 days from the delivery of the Ruling.
- 7) The 1st Plaintiff is at liberty to regularize transfer of shares to the 2nd Plaintiff in accordance with the Articles of Association.
- 8) The Plaintiff's application is granted on the above terms with costs by the Defendants.
- 9) In default the Directors of the Company shall be subjected to contempt of court proceedings.
- 10) Any execution order shall only be effected after the return to normalcy after the Corona Virus Pandemic lockdown abates and an official announcement of the same.

DELIVERED SIGNED & DATED IN OPEN COURT ON 15TH APRIL 2020.

M.W.MUIGAI

JUDGE

IN THE PRESENCE OF:

MS. MOCHU KAHARA ADVOCATES FOR THE APPLICANT

MS. C. M. ONGOTO & ADVOCATES FOR THE RESPONDENT