



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA

JUDICIAL REVIEW

PETITION NO. 48 OF 2014

BRANS PHARMACEUTICALS LIMITEDPLAINTIFF/APPLICANT

VERSUS

SALOME WACHERA MWANGI.....DEFENDANT/RESPONDENT

JUDGEMENT

1. This decision is on the Petition dated 24.7.2014 express to be brought pursuant to the provisions of Sections 165,166,1967, 168, 169, 170, 171 and 172 of the Companies Act, Cap 486, (now repealed) and the inherent powers of the court.

The petition seeks orders that:-

- a) **The Court do Appoint the Firm of Yusuf and Company Auditors to inspect and investigate the affairs of BRANS PHARMACEUTICAL LIMITED, and avail a report of their findings within 30 days from the date of appointment.**
- b) **An Order directing the Respondent to give full account of all the Company's assets, profits and income from the Pharmacy, better known as BRANS PHARMACEUTICAL LIMITED, for the period effective February 2012 to date**
- c) **An Order that the Respondent do re-transfer or deposit all the incomes from the sale, disposal or otherwise of the Company's assets effective February 2012 to date, more so, motor vehicle No. KBY 512 together with interest thereon at 12% per annum thereon till date of payment/retransfer into Company Account Number [particulars withheld] Stanbic C.F.C. Bank Digo Road Branch Mombasa.**
- d) **THAT pending the reconciliation of accounts in Account No. [particulaaars withheld] held at Equity Bank Digo Road Branch Mombasa and Account No. [particulars withheld] at Cooperative Bank of Kenya, Digo Road Branch, Mombasa all future Company income from the Pharmacy, profits and/or assets in the name of the Company be forthwith directly deposited in the Company's Bank Account Number [particulars withheld] at Stanbic C.F.C. Banki Digo Road Brach Mombasa.**
- e) **THAT account be taken for any property and assets bought under the Company name since inception.**
- f) **THAT all Company Accounts opened by the Respondent in the name of the Company be**

closed, to wit, accounts at Equity Bank Account No. [particulars withheld] and Cooperative Bank Account No. [particulars withheld], and any other account that may be held elsewhere under the Company's name.

g) THAT all monies deposited after the closure of accounts as in (f) above be remitted into the Company account.

h) THAT an Order be directed at the Managers Equity Bank Digo Road Brach Mombasa and Cooperative Bank Digo Road Branch Mombasa, freezing any transfer, transaction, withdrawal or otherwise dealing with the Accounts in the Company's name, that is, Account No. [particulars withheld] at Equity Bank Digo Road Branch Mombasa, and Account No. [particulars withheld] at Cooperative Bank Digo Road Branch Mombasa.

i) An Order that upon Orders (a),(b),(c),(d),(e),(f),(g) and (h) being complied, then the Petitioner do buy out the Respondent's interest by paying the Respondent 10% of the Company's worth.

j) Any such other order as shall be just.

2. Simultaneous with the petition was filed and Notice of Motion dated the same day and seeking orders that all income from business of the company trading as **BRANS PHARMACETICAL LTD** be deposited at an account operated at **STANBIC BANK, DIGO ROAD, MOMBASA** to be operated by the signatures of both directors of the Company notwithstanding the accounts mandates; that there be appointed YUSUF & CO, Auditors to inspect and investigate the affairs of the company and report to court within 30 days of appointment; that the Secretaries, Directors, Employees and all associated with the company to cooperate and assist and with production of documents and information to the inspector and that the court does give suitable orders to effectuate the inspectors' report once filed in court for purposes of determining the petition.

3. It is evident from the record that prayer two was granted in the interim on the 28/7/2014 and what remains of that application are prayer 3-5. Preliminarily, I am of the view that the court having set down the petition for hearing, it will not serve any useful purpose to consider and determine an application which was intended to be interlocutory and to preserve the property in dispute pending the determination of the petition. This is more evident when one looks at the prayers in the application and those in the petition. The justice of the matter will adequately be served even if the application is not considered because the substantive prayers in that application is equally the prayers in the petition.

4. This determination will therefore be on the petition as supported by the affidavit in support as well as the further affidavit and being opposed by the replying affidavit and the notice of preliminary objection.

5. The gist of the petitioner's complaint is that he, being the majority Shareholder, has been sidelined and excluded from the operation and control of the company which is under the control of the only other shareholder being the minority shareholder. As a result of such exclusion, the petitioner contends that the assets of the company are being used to its peril and at the unfair enrichment by the Respondent.

6. In opposition to the petition the Respondent filed both replying affidavit and Notice of Preliminary objection. Although the parties agreed that the petition, application and preliminary objection be heard together, I have read the file and I have decided that I will deal with the preliminary objection first if it be capable of disposing the petition and deal with the petition on merits if need shall arise at the end of the determination of the Preliminary Objection.

THE PRELIMINARY OBJECTION

7. As crafted and filed the preliminary objection faults the petition and application for being an affront to the provisions of the Act; that it is contrary to Section 165, 166 and 344 and that the company cannot seek to investigate itself. In his submissions Mr. Opolu for the Respondent submitted that in determining this

matter the court should ask itself who is the appropriate claimant and if an investigation can be ordered against an individual.

8. To enable this point be determined, it is prudent to reproduce the relevant provisions of the law here:-

Section 165 of the Companies Act: Investigation of company's affairs on application of members

(1) The court may appoint one or more competent inspectors to investigate the affairs of a company and to report thereon in such manner as the court directs—

(a) in the case of a company having a share capital, on the application either of not less than two hundred members or of members holding not less than one-tenth of the shares issued;

(b) in the case of a company not having a share capital on the application of not less than one-fifth in number of the persons on the company's register of members.

(2) The application shall be supported by such evidence as the court may require for the purpose of showing that the applicants have good reason for requiring the investigation, and the court may, before appointing an inspector, require the applicants to give security, to an amount not exceeding ten thousand shillings for payment of the costs of the investigation.

Section 166 of the Companies Act: Investigation of company's affairs in other cases Without prejudice to its powers under section 165 the court—

(a) Shall appoint one or more competent inspectors to investigate the affairs of a company and to report thereon in such manner as the court directs, if the company by special resolution declares that its affairs ought to be investigated by an inspector appointed by the court; and

(b) May do so, if it appears to the court upon a report from the registrar that there are circumstances suggesting—

(i) that the company's business is being conducted with intent to defraud its creditors or the creditors of any other person or otherwise for a fraudulent or unlawful purpose or in a manner oppressive of any part of its members or that it was formed for any fraudulent or unlawful purpose; or

(ii) that persons concerned with its formation or the management of its affairs have in connection therewith been guilty of fraud, misfeasance or other misconduct towards it or towards its members; or

(iii) that its members have not been given all the information with respect to its affairs which they might reasonably expect; or

(iv) that it is desirable so to do. 167. ***Power of inspectors to carry investigation***

9. I am not in doubt that the company subject of these proceedings is one with share capital and held by two contributories as follows:-

Ronald Cornelis Brans: 4500 shares

Salome Wachera Mwangi : 500 Shares

For the jurisdiction of the court under sections 165 & 166 of the Repealed Act to be properly involved, an application for investigation of the company must be lodged by members holding not less than 1% of the

issued shares. To this court such an application must be brought by the shareholders against the company and not by the company itself. To the extent that it is the company disclosed as applying, I am of the opinion and to hold that Section 165 of the Companies Act, now repealed, does not support the petition nor does it entitle the court to grant the orders sought.

10. How about Section 166? The provision under section 166 demands that the application be instigated and preceded by two occurrences.

- Under 166 (a):-there must be a resolution by the company declaring that it offers to be investigated.
- Under 166 (b) :- there ought to be a report by the Registrar of company's

In both events it is in the opinion of the court that there must be an applicant who is not the company itself.

11. These provisions have been reenacted in the Companies Act 2015, At Sections 786 and Section 787 which underscores the importance of investigation of a company as an oversight tool in corporate governance. In the present case there is no applicant but the company itself seeking that its affairs be investigated.

To me it would appear that this was an apt case for a derivative action as the complaint seems to be against a minority but that avenue was never resorted to.

12. How it comes to be that the minority has now excluded the majority and rendered the majority helpless is difficult to understand. It is however apparent that the company may not be properly or fairly run as a corporate separate and distinct from the director in charge, the minority. I would therefore decline to grant the orders sought but also decline to strike out the petition but would also not leave the matter pending with no direction to solve an apparent problem in the company's engagement.

13. Now that the prerequisites of appointment of an investigation under the law have not been met by the petition, in that it is not the members petitioning neither is there a special resolution nor a report by the Attorney general, it is in the opinion of the court that there are problems which need to be tackled and resolved and resolved with the supervision of the court. Instead of allowing the preliminary objection and dismissing the petition which actions will not be resolved depute, I direct as follows:

(i) Let a resolution of the company requisite under Section 787 of the companies Act 2015 be filed within 45 days from today.

(ii) In the alternative let a complaint be made to the Attorney General, and the office of the Attorney General files a report on the company. On matter enumerated under Section 787 (2) of the Companies Act 2015. Such complaint be lodged within 30 days and report by the Attorney General be filed within 45 days from the date of lodging complaint.

(iii) This order be extracted and served upon the Attorney General with the letter of complaint if the parties shall choose to take that option.

14. As the ruling has not finally disposed of the petition, I direct that each party shall bear all costs.

15. This matter be mentioned in court on 15/5/2017 to confirm compliance.

Dated at Mombasa this 01st day of March 2017.

P.J.O. OTIENO

JUDGE