



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION
MISC. CIVIL APPLICATION NO.511 OF 2013

IN THE MATTER OF THE COMPANIES ACT,CAP. 486 LAWS OF KENYA

AND

IN THE MATTER OF THE KENYA OATMEAL LIMITED

AND

IN THE MATTER OF THE RECTIFICATION OF THE COMPANY REGISTER

SAIDA KARIMBUX (suing through her

Court Appointed guardian, SAADIA KARIMBUX - EFFENDY.....1ST APPLICANT

SAADIA KARIMBUX - EFFENDY (suing as a co-administrator of the Estate of her father,

the late YAKUB UMARDIN KARIMBUX.....2ND APPLICANT

VERSUS

SUKHWINDER SINGH JUTLEY1ST RESPONDENT

REGISTRAR OF COMPANIES.....2ND RESPONDENT

RULING

Rectification of Register of Members

[1] I am confronted with an Originating Notice of Motion dated 5th December, 2013 brought under Section 118 of the Companies Act and Rules 3 and 7 of the Companies (High Court) Rules

seeking for 6 reliefs. Relief number 1, 2, 4 and 5 are spent. I now need to determine relief number 3 and 6 of the application which is styled as follows:

1. **That this Honorable Court be pleased to issue an Order directing the forthwith Rectification of the Register of the Company known as “The Kenya Oatmeal Limited”, (incorporation No. C 559) in the following manner:**
 - a. **The name of the 1st Respondent, Sukhwinder Singh Jutley be deleted, removed and/or cancelled as a Director and holder of 2,800 shares or any shares whatsoever in the company.**
 - b. **The Register be rectified to reflect the following correct Shareholding/Directorship structure:**

SHAREHOLDING STRUCTURE

| | |
|--|---------------------|
| Saida Karimbux, 1st Applicant | 2,808 Shares |
| Estate of the late Yakub Umardin Karimbux | 2,521 Shares |
| Total | 5,329 |

DIRECTORSHIP STRUCTURE

| | |
|--|-----------------|
| Saida Karimbux, 1st Applicant | Director |
| Saadia Karimbux, 2nd Applicant | Director |

2. **The costs of this Application be awarded to the Applicants to be borne by the Respondents.**

[2] I will not analyze the affidavits or the submissions of parties herein for reasons which will be borne out in the decision I will ultimately make in this matter. However, in a limited scope, I have looked at the affidavits filed and I see accusations and counter-accusations by the parties. The allegations being made against the 1st Respondent are in the nature of fraud and breach of fiduciary relationship. They are grave allegations some bordering on criminal culpability. On the other hand, the 1st Respondent is making equally serious allegations against the 2nd Applicant; that she has been taking advantage of the poor mental health of the 1st Applicant to unsettle decision she took during her good health. Such allegations are serious and describe a depraved or debauched character. All these issues commend themselves to resolution in a plenary forum rather than in a restricted or summary process.

[3] And I have agonized over this matter for three reasons: 1) the allegations herein are serious and in the nature of fraud; 2) those allegations could not be disposed of in a summary manner or by means of affidavit evidence alone; and 3) therefore, what is the best course that the law provides in the circumstances. I am guided by the law on rectification of register by the court as contained in section 118 of the Companies Act Cap 486 Laws of Kenya as follows that:-

“118 (1) If:-

(a) the name of any person is without sufficient cause entered in or omitted from the register of members of a company or

(b) default is made or unnecessary delay takes place in entering on the register the fact of any person having ceased to be a member, the person aggrieved or any member of the company or the company, may apply to the court for rectification of the register.

(2) Where an application is made under this section, the court may either refuse the application or may order rectification of the register and payment by the company of any damages sustained by any party aggrieved”.

[4] Much help comes from judicial decisions as well as respected literary work which have defined the scope of jurisdiction and power of court in handling applications on rectification of register of members of a company. First, the jurisdiction to rectify register by court is discretionary albeit the discretion must always be exercised in accordance with the law; not whimsically; not capriciously. Therefore, what are the principles which guide the exercise of discretion under section 118 of the Companies Act?

[5] The first consideration the court should understand is that it should invoke a summary process under section 118 only on clearest of cases. See the case of **PRAB HULAL TEJPA HARIA & ANOTHER v PRAVIN CHANDRA MEGHJI DODHIA & 2 OTHERS [2007] eKLR**, where Warsame J (as he then was) expressed himself that;

“In my view the summary powers of the court can be invoked in plain and clear cases, where there is no need for a trial..... The powers under section 118 of the company’s Act cannot be invoked when there is a real and complicated dispute as to the real interests of the parties.”

[6] This case is not, by any standards a clear one.

[7] The second consideration is that, the power of the court is not restricted to the instances provided for in section 118 of the Companies Act. Thus the court may rectify the register on other potent grounds which in the opinion of the court will **enable the members of a company to have a fair and reasonable exercise of their rights**. See the excerpt below from **Halsbury’s Laws of England, (4th Edn.), Vol. 7(1) para 372** on court’s jurisdiction to rectify company register:

“372. General jurisdiction to rectify company's register of members

The jurisdiction to rectify a company's register of members is discretionary; and it is not limited by the provisions of the Companies Act 2006. Thus the court will rectify the register, apart from that Act, to enable the members of a company to have a fair and reasonable exercise of their rights.

When the court entertains the application, it is bound to go into all the circumstances of the case, and to consider what equity the applicant has to call for its interposition and the purpose for which relief is sought.

The power to rectify has been exercised where there has been misrepresentation in the prospectus; where it is expedient to have an order which will bind all the shareholders and effectually bar any subsequent application for restoration of a name struck out by the directors; where shares have been illegally allotted at a discount; where the application for shares has been made in the name of a person, as, for example, an underwriter, without his authority; where there is no valid allotment of shares; or the allotment is not made within a reasonable time, or is irregular; where a transfer of shares has been improperly registered or registration has been refused; where there are joint holders of shares who wish to divide the shares so held into two parts with their names entered in the register in respect of each part in a different order; where the company puts on its register matters which are not required by the statute; in order to set right allotments of shares which have been

issued as fully paid without a proper contract being filed; and where an overseas company was entered in the register without the permission of the Treasury, which was at the time required.”

[8] I am now properly grounded in law and should make the decision. By reason of the nature and extent of the allegations herein, which are in the nature of fraud and aggravated fraud, others bordering depraved character, I am of the opinion those are matters which will require investigation or can more satisfactorily be dealt with through viva voce evidence of the parties and witnesses named or to be called by parties. As such, and in light of the demands of Article 159 of the Constitution that courts should always serve substantive justice in such cases, and being alive to the fact that the court **is bound to go into all the circumstances of the case, and to consider what equity the applicant has to call for its interposition and the purpose for which relief is sought;** I cannot determine the application on affidavit evidence alone without causing great injustice in the matter. Instead, I will require the Applicants and the Respondents to lead viva voce evidence by themselves and other witnesses named in the pleadings or as shall be called by the parties. I do not think, in the new constitutional dispensation on access to justice and right to fair hearing, it will be a feasible option for a court of law to dismiss an application such as this simply because the Applicant has a chance of instituting an action for rectification. Also I find comfort in the fact that the proceedings before me have been commenced by way of an Originating Notice of Motion which is permitted way of commencing substantive proceedings. It is, therefore, ordered that the Motion herein shall be determined upon viva voce evidence of the parties by themselves or their witnesses which they wish to call. This is in addition to the affidavit evidence filed together with the documents filed thereto. I also direct that, as the parties herein are registered as shareholders of a company under the Companies Act, participation of the Registrar of Companies is most imperative not because he is a party in the suit but also because, should any order for rectification be issued, it will be directed to the Registrar. Due notice of the hearing of these proceedings shall, henceforth, at all times be given to the Registrar of Companies. It is so ordered.

[9] Meanwhile, for as long as these proceedings are pending, none of the properties of the company herein shall be disposed of or charged or exchanged with another or assigned to any person or given as lien or dealt with in any manner which will prejudice this case or any party in the suit. Similar order was issued by the court on 18th December, 2013 and shall remain in force as directed herein except as far as they may be varied or set aside by the court.

Dated, signed and delivered in open court at Nairobi this 2nd day of July, 2014

F. GIKONYO

JUDGE