



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 438 OF 2013

SHOBNABEN PANKAJKUMAR PATANI PLAINTIFF

VERSUS

PRADEEP HARAKCHAND PATANI & OTHERS DEFENDANT

RULING

By a Notice of Motion dated 17th October 2013 and filed in court on 17th October 2013, the plaintiff/applicant Shobnaben Pankaj Kumar Patani sought from this court an injunction to issue restraining the defendants Pradeen Harakchand Patani, Mahendra Kumar Harakchand Patani, Drop In Limited and the Registrar of Companies, their agents and or nominees from presenting for registration and or accepting or registering the resolutions reached by the 1st and 2nd defendant on 12th June 2013 at an extraordinary Board of Directors meeting which resolution purported to remove and indeed did remove the plaintiff/applicant from the list of directors of the 3rd defendant/respondent company.

The plaintiff/applicant further sought an order that the 1st and 2nd defendants/respondents be ordered to provide the plaintiff with accounts in respect of the 3rd defendant's income from the year 2006 and an order that they pay her the director's emoluments since the year 1995.

The plaintiff/applicant sought further that in the event that the said resolution has been registered by the 4th defendant/respondent, the same should be expunged forthwith.

The applicant's application was supported by the grounds apparent on the face of the Notice of Motion and the annexed sworn affidavit of the applicant on 20th August 2013 at Stanmore, Middlesex, United Kingdom.

The application was heard on 23rd September 2014 wherein the applicant's counsel, Mr. Oyatta argued the application on her behalf, he submitted that the 3rd defendant is a family business in which the applicant herein is a director and shareholder. She is the widow of the late brother to the 1st and 2nd defendant/respondents and that she took over the directorship and shareholding of 1500 shares after her husband's demise in 1995. He further submitted that the 3rd defendant company owns a building along Biashara Street which generates rental income.

That on 21st may 2013 the 1st and 2nd defendant issued a notice to the other directors of the 3rd defendant company calling for an extraordinary Annual General Meeting whose main agenda was the removal of the plaintiff herein from the directorship of the company. Despite her protests through her proxy Mr

Patel, the meeting proceeded to a vote of 2 to 1 which eventually removed her from the directorship of the 3rd defendant/respondent company.

Mr Oyatta further submitted that it was erroneous for the two directors to rely on a court ruling in an earlier case HCC 66/2009 copy which was annexed to the affidavit of the applicant, as the said ruling by the High Court never made any reference to the issuer of her resources as a director. He submitted that as a life director, the other two directors had no power to remove her and sought orders reversing that decision by filing suit herein and further seeks for accounts. The application was unopposed despite service of the same having been effected upon the defendants/respondents.

The application herein was filed over one year ago. At the hearing, counsel for the plaintiff/applicant did not indicate whether the defendants had proceeded and presented for registration or whether the registration of the resolution in question had been effected by the Registrar of Companies. Assuming the registration of the resolution has taken place, this court is confronted with an application for a mandatory injunction which is an extra ordinary remedial process and which is never granted as a matter of right but in the exercise of sound judicial discretion. On the other hand, assuming the registration has not been effected, then the court in the exercise of judicial discretion will be entertaining an application for a temporary injunction to restrain the defendants from effecting the registration of a resolution that sought to remove the applicant from being a director of the third defendant/respondent company.

On the other hand, the applicant seeks in his prayer number six an interlocutory mandatory injunction which states as follows:

“In the event that the aforesaid resolution has already been registered with the 4th defendant, an order do issue to expunge the said resolution forthwith.”

This in itself is a mandatory and not a prohibitory injunction sought by the plaintiff as a prohibitory injunction would not be able to command the 4th respondent to expunge the registration of the resolution from the records.

The principles of granting interlocutory mandatory injunction are also different from those that apply to interlocutory prohibitory injunction. Going back to the principles for granting interlocutory injunctions which are now well settled as encapsulated in the ***Giella – Versus – Cassman Brown & Co Ltd [1973] EA 358***, an applicant for an interlocutory injunction must prove that he has a prima facie case with a probability of success against the defendant and that unless the orders sought are granted, he will suffer irreparable harm which cannot be compensated by way of damages.

If the Court is in doubt, the Court will determine the application on a balance of convenience. The plaintiff has placed material before the Court by way of a notice to members of an extra Ordinary General Meeting under Clause 49 of Table A of the Articles of the company for Wednesday 12th June 2013 at 11.00 a.m. with the agenda of the removal of Shobnaben Pankajkumar Patani as a director of the company. The notice is issued by Sailesh Patel on 21st may 2013 and copied to the plaintiff herein among others and enclosing a proxy form.

Albeit the resolution of the said meeting is not annexed, the plaintiff has deponed that she is informed by her appointed proxy who made representation on her behalf protesting her removal but the motion to vote carried two votes against one director leading to her removal and therefore what remained was registration to be effected by the 4th defendant. She also annexed a copy of letter of protest written by her advocates on record to the Registrar of Companies asking the said Registrar not to recognize or register the said resolution as passed as it offended the express provisions of Section 185 of the Companies Act.

Under Section 185 of the Companies Act Cap 486 Laws of Kenya, a company may by ordinary resolution remove a director before the expiration of his period of office, notwithstanding anything in its articles or in any agreement between it and him.

The proviso thereto proves that:

“provided that this subsection shall not in the case of a private company authorize the removal of a director holding office for life at the commencement of this Act, whether or not subject to retirement under the age limit by virtue of the articles or otherwise.”

The applicant contends that being a life director, the purported removal contravened the above proviso. I agree.

I am therefore persuaded that the applicant has established a prima facie case against the respondents with a probability of success. In addition, in the event that the injunction sought is not granted, I am satisfied that as a life member, she stands to suffer irreparable damage as she will be kept out of the affairs of the company which generates income and the sitting directors will not be liable to account to her as their co-director. The balance of convenience also tilts in her favour. Accordingly, I grant a temporary injunction restraining the defendant/respondents from presenting for registration and or the fourth respondent from registering the resolution passed on 12th June 2013 by the 1st and 2nd respondents.

However, having noted that the applicant’s prayer number six seeks for a mandatory interlocutory injunction, which seeks to expunge the registration of the resolution in the event that it has been effected, although the applicant/plaintiff has established a prima facie case with a probability of success, the type of injunction sought if granted would determine the entire suit at this interlocutory state and is therefore not appropriate in the circumstances. I notice from the record that the 1st, 2nd and 3rd defendants having entered appearance on 8th July 2014, have not filed their defence and on 11th August 2014 the court entered interlocutory judgment against them. The suit is pending formal proof hearing. I see no reason why the plaintiff cannot set down the case for formal proof hearing as she sought and obtained interlocutory judgment.

It would not serve the interest of justice for both parties to grant relief which in essence would be tantamount to deciding the case finally without the benefit of a hearing. Mandatory injunctions can only issue by the court where there exists special circumstances. None existed in this case. The Court of Appeal cited with approval in CA 332/2000 [2002] IEA 109 Kenya Breweries Ltd & Another – Vs – Washington O. Okeyo, the English decision of Locabail International Finance Ltd – Vs - Agro Export & Others [1986] ALL ER 901 that

“a mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could easily be remedied or where the defendant had attempted to steal a march on the plaintiff. Moreover, before granting a mandatory interlocutory injunction the court had to feel a high degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard that was required for a prohibitory injunction.”

I am not persuaded that the plaintiff has made out a clear case which would entitle me to feel a high degree of assurance that at the trial it would appear that the injunction had rightly been granted.

The applicant/plaintiff’s prayer No. (d) seeks for an order ensuring that the plaintiff is now henceforth allowed to enforce her right to participate in the functioning of the 3rd defendant company and is not hindered or obstructed from carrying out the duties as an equal shareholder/director of the same.

The above order as prayed, in my view, can only be granted if the court, on discovery that the resolution was registered effecting her removal, is expunged from the register. In other words, the plaintiff can only be enabled to participate in the affairs of the company if the registration of the resolution is cancelled.

Another reason why this court is reluctant to grant the mandatory injunction expunging the resolution in the event that it is already presented and registered by the 4th defendant is that the record is clear that the

plaintiff was very much aware of the resolution having been represented by her proxy Mr Patel. She was aware that after passing the resolution, the same was capable of being presented for registration and being registered by the 4th defendant. She instructed her advocates on record who on 12th June 2013 – the same day the resolution was made, to write a protest letter to the 4th defendant, which was dutifully done. However, it took her four (4) months to file suit in court seeking for the orders herein thus 17th October 2013. The pleadings were signed and dated in August 2013. By that time, it is my view that she must have known that without any prohibition, the 1st and 2nd defendants must have proceeded to present the resolution passed on 12th June 2013 to the 4th defendant for registration. The court would then be engaged into an academic exercise and an exercise in futility.

Consequently, the prayer No. 6 is declined. On the prayer for account which is number 5 in respect of the 3rd defendant's income from the year 2006 and payment of her emoluments as a director since the year 1995, again, this prayer is sought in the applicant/plaintiff's plaint dated 19th August 2013 as prayer number nine and it reads:

“a full disclosure of all the financial accounts as well as annual returns, including annual tax returns of the 3rd defendant company from the year 2006 till date.”

Prayer (b) seeks provision of the 3rd defendant company's bank statements for the purposes of reconciliation and due diligence.

As I have stated and I reiterate here, that the applicant has not laid the grounds upon which such mandatory injunction should be granted at this interlocutory stage. She has been a life director since 1995 yet she has never been involved in the affairs of the 3rd defendant company. She has not indicated that she was prevented by the 1st and 2nd directors from participating in the said affairs or asked for emoluments and were denied. Nonetheless, she has sought the said orders substantively in her suit herein. To grant such prayers requires more information to be gathered and investigations into the accounts of the 3rd defendant company. No such prayer for investigations into the affairs of the company using competent investigators was sought. It requires much more than mere disclosure.

It has to involve production of all documents and books of account in the custody of the respondents as well as production of all information on oath relating to the dealings of the Company including creditors.

For the same reasons that I have rejected prayer number six, I reject the prayer for accounts and payment of director's emoluments at this stage as more evidence is required to prove the alleged facts which can only be expected at the hearing of the substantive suit.

The upshot of all this is that I grant the applicant's prayer number two and three of the Notice of Motion dated 17th October 2013 and reject prayer five and six.

Costs shall be in the cause.

Dated, signed and delivered at Nairobi this 14th day of October, 2014.

R.E. ABURILI

JUDGE