



**Dawoodia v Wills & 2 others; Vogt & another (Interested Parties); Muthaiga Travel Limited (Plaintiff to the Counterclaim); Dawoodia (Defendant to the Counterclaim) (Civil Suit 386 of 2017) [2025] KEHC 13415 (KLR) (Commercial and Tax) (26 September 2025) (Judgment)**

Neutral citation: [2025] KEHC 13415 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL SUIT 386 OF 2017  
FG MUGAMBI, J  
SEPTEMBER 26, 2025**

**BETWEEN**

**FEMINA DAWOODIA ..... PLAINTIFF**

**AND**

**KLARISSA WILLS ..... 1<sup>ST</sup> DEFENDANT**

**LIUBOV MAKCHINA ..... 2<sup>ND</sup> DEFENDANT**

**MUTHAIGA TRAVEL LIMITED ..... 3<sup>RD</sup> DEFENDANT**

**AND**

**JOY WANJIKU VOGT ..... INTERESTED PARTY**

**MIRA HEMAL BID SHAH ..... INTERESTED PARTY**

**AND**

**MUTHAIGA TRAVEL LIMITED ..... PLAINTIFF TO THE COUNTERCLAIM**

**AND**

**FEMINA DAWOODIA ..... DEFENDANT TO THE COUNTERCLAIM**

**JUDGMENT**

**Introduction and Background**

1. By a Plaint dated 19<sup>th</sup> September 2017, the Plaintiff, Femina, instituted this suit against the Defendants, Klarissa and Makchina, seeking judgment for alleged breach of the Articles of Association of the 3<sup>rd</sup> Defendant company (“the Company”). Femina’s case is that the Defendants unlawfully sold and



transferred 40,000 shares from Klarissa to the Interested Parties, Joy and Mira, without first offering them to her, despite her pre-emptive rights as an existing shareholder. On that basis, Femina prays for the nullification of the impugned transfer and an award of damages for the alleged breach.

2. Femina contends that Articles 4 and 5 of the Company's Articles of Association impose a strict procedure for the disposal of shares. A member intending to sell shares is required to give written notice to the Board of Directors, who then act as agents to dispose of the shares at an agreed price to another member of the Company. Once such a price is set, the Board is obliged to notify all shareholders, inviting them to indicate within one month whether they are willing to purchase the shares. Femina avers that Klarissa had previously adhered to this procedure in two earlier instances, in 2010 and 2011, when she offered shares for sale to her.
3. It is Femina's case that, contrary to the Articles, the Defendants approved and effected the transfer of 40,000 shares to Joy and Mira on or about 16<sup>th</sup> June 2013. At the time of the transaction, the Interested Parties were not registered shareholders of the Company. Femina asserts that no evidence has been produced showing that the mandatory written notice was ever issued either to the Board or to herself. She further alleges that the transaction was tainted with malice: first, because she had been removed as a director shortly before the transfer, and second, because the shares were sold to the Interested Parties at a price significantly lower than that at which they had earlier been offered to her.
4. As a result, Femina seeks a declaration nullifying the transfer of the 40,000 shares to the Interested Parties for being irregular, illegal, and in breach of the Articles of Association. She also claims damages for loss of opportunity quantified in two components. First, she seeks 45% of directors' bonuses and remuneration paid to the Interested Parties between 2013 and 2021, amounting to Kshs. 145,643,695.20 out of the total directors' payouts of Kshs. 323,652,656.00.
5. Second, she claims the value of the 40,000 shares as of 31<sup>st</sup> March 2013, calculated at Kshs. 149,681,518.00 based on the Company's total asset base of Kshs. 374,203,795.00. The total damages claimed under this head therefore stand at Kshs. 295,325,213.20. In addition, Femina prays for general, exemplary, and/or punitive damages in the sum of Kshs. 100,000,000.00 for the alleged unlawful conduct of the Defendants and the Interested Parties.
6. The Defendants and the Interested Parties filed their respective defences, while the Company also lodged a counterclaim dated 5<sup>th</sup> October 2017. Their common position is that Femina's claim is misconceived and unsustainable in law. In particular, they contend that general damages are not awardable for breach of contract. They further argue that Femina's claim of Kshs. 145,643,695.20, framed as "lost opportunity", is in truth a disguised claim for directors' bonuses.
7. According to them, Femina ceased to be entitled to such bonuses after she resigned as an employee and was subsequently removed as a director. The Company's policy, they assert, permitted only executive directors who were employees to earn directors' bonuses, and it did not recognize non-executive directors. They maintain that Femina had previously received directors' bonuses only while employed, a fact she allegedly concealed in her pleadings.
8. The Defendants and the Interested Parties further assert that Femina had declined an opportunity to purchase shares in the Company, allegedly stating that she was "not willing to acquire a majority stake in an insolvent company." It is their case that, following her refusal, Klarissa lawfully proceeded to sell the shares to the Interested Parties. They additionally accuse Femina of breaching the Memorandum and Articles of Association by incorporating a rival business, Travelwise (Kenya) Limited, while she was still a shareholder and director of the Company.



9. They contend that she diverted corporate opportunities, including failing to renew the Fair View (“FV”) Hotel lease for the Company and instead procuring it for her own enterprise. This, they argue, led to substantial financial losses for the Company, evidenced by a decline in profits from Kshs. 28.6 million in 2012 to Kshs. 566,414 in 2021.
10. On the strength of these assertions, the Company counterclaims against Femina for loss of profits allegedly suffered between 2013 and 2021, loss of goodwill valued at Kshs. 33 million arising from the loss of the FV Hotel business, and relocation costs of Kshs. 12.9 million incurred in establishing new offices. They urge the Court to dismiss Femina’s claim in its entirety and to allow the Company’s counterclaim with costs.
11. When the matter proceeded to hearing, Femina testified on her own behalf as PW1. She adopted her witness statement dated 19<sup>th</sup> September 2017 and produced her bundle of documents of even date (PExhibit 1). She also called CPA Robert Kamwara (PW2), an accountant who prepared the computations in support of her claim for damages.
12. On their part, the Defendants and Interested Parties relied on the testimony of Klarissa (DW1), who adopted her witness statement dated 17<sup>th</sup> July 2023 and produced two bundles of documents dated 14<sup>th</sup> September 2022 and 17<sup>th</sup> July 2023 (DExhibit 1 and DExhibit 2, respectively).
13. At the close of the hearing, the Court directed the parties to file written submissions. These are duly on record. Since the submissions largely mirror the parties’ respective positions already summarized above, I will not reproduce them verbatim. I shall, however, refer to the relevant portions where necessary in the analysis and determination that follows.

### **Analysis and Determination**

14. From the parties’ submissions, no express list of agreed issues was framed for the Court’s consideration. However, upon review of the pleadings, evidence, and submissions, the following issues emerge for determination:
  - i. Who, as between the parties, was in breach of the Company’s Articles of Association?
  - ii. Whether the transfer of 40,000 shares by Klarissa to the Interested Parties ought to be nullified.
  - iii. Whether Femina is entitled to general damages for breach of contract, damages for lost opportunity and exemplary and/or punitive damages.
  - iv. Whether the Company has established entitlement to loss of profits, loss of goodwill, relocation and office set-up costs.
  - v. Who should bear the costs of the suit and the counterclaim?

Breach of the Company’s Articles of Association and Femina’s Pre-emptive Rights:

15. The parties traded accusations of breach of the Company’s Articles of Association. Femina’s case is that the Defendants, acting jointly and severally, breached the Articles by selling and transferring 40,000 shares from Klarissa to the Interested Parties without first offering them to her. She contends that under Articles 4 and 5, she held pre-emptive rights which had not been waived, and that the procedure required a shareholder wishing to sell shares to give written notice to the Board, which would then offer the shares to existing members.
16. Femina testified that Klarissa had previously complied with this procedure in 2010 and 2011, when shares were offered to her. However, on or about 16<sup>th</sup> June 2013, the Defendants allegedly approved the



transfer of 40,000 shares to the Interested Parties, who were not members of the Company, without notice to her. She maintains this was a direct violation of Articles 4 and 5. The Defendants and the Interested Parties, on the other hand, contend that Femina was in fact offered the shares but declined to buy them, citing the Company's alleged insolvency.

17. The evidence on record shows that Klarissa issued a notice dated 27<sup>th</sup> July 2011 offering to sell 95,000 shares at USD 5 per share, expressly invoking Article 4 of the Articles of Association. The Company communicated the same to Femina, requiring her to confirm if she wished to purchase the shares and in what proportion. Femina responded through her advocates' letter dated 18<sup>th</sup> August 2011, accepting the offer but subject to several "terms and conditions".
18. From the totality of the evidence, it is apparent that Klarissa complied with the requirements of Article 4 of the Company's Articles of Association by issuing a written notice of her intention to sell shares. The notice of 27<sup>th</sup> July 2011 expressly set out the number of shares and the price at which they were to be sold. The obligation of the selling shareholder under Article 4 was to give existing members the first right of refusal at a specified price. That obligation was discharged once the offer was made in accordance with the Articles.
19. Femina's response to the offer was not an unconditional acceptance. Through her advocates' letter of 18<sup>th</sup> August 2011, she purported to accept the offer but subject to "terms and conditions" that were extraneous to the original offer. Thereafter, protracted correspondence ensued. The Company's advocates, in a letter dated 28<sup>th</sup> January 2012, expressed concern that the transaction was stalling as Femina had not taken steps to complete the purchase and warned that the Company would invite bids from the public.
20. The subsequent correspondence, including Femina's own letter of 31<sup>st</sup> October 2012, demonstrates that she herself considered the transaction aborted unless her counter-proposals were met. Indeed, her statement that she was "not willing to acquire a majority stake in an insolvent company" clearly evinced an intention not to proceed with the purchase on the terms offered. This amounted to a rejection of the offer within the meaning of contract law principles. Klarissa's advocates responded on 14<sup>th</sup> November 2012, confirming that in light of Femina's stance, the transaction had collapsed.
21. In these circumstances, Klarissa was entitled, both commercially and under the Articles of Association, to treat the matter as closed and to proceed to dispose of her shares elsewhere. The rationale behind pre-emptive rights is to give existing shareholders the first option to buy and to preserve the character of a private company by controlling membership. The rights are not intended to frustrate the disposal of shares or to unduly prejudice the selling shareholder or the company. As such, once a bona fide offer was made in accordance with the Articles, the selling shareholder was free to deal with their shares if existing members declined.
22. There is no evidence on record of bad faith or sharp practice on Klarissa's part. On the contrary, the contemporaneous correspondence shows protracted attempts to reach an agreement, which ultimately failed because of Femina's own position.
23. Accordingly, I find that Klarissa discharged her obligations under the Articles by first offering the shares to Femina. The failure of the transaction was attributable to Femina's conditional acceptance and eventual withdrawal, not to any omission or breach on the part of the Defendants. Having exercised her pre-emptive right but declined to proceed, Femina cannot now be heard to challenge the subsequent transfer to Makchina and the Interested Parties.



24. I therefore hold that the Defendants and Interested Parties were not in breach of the Articles of Association, and that the transfer of shares was validly undertaken in accordance with the Company's Articles.

Incorporation of an Alleged Competing Company by Femina:

25. I now turn to the breach alleged by the Company against Femina. The complaint is that she breached her fiduciary duties as a director by incorporating a rival company which directly competed with the Company, thereby occasioning financial loss.

26. I find merit in the Defendants' submissions, fortified by the well-established principle in *Regal (Hastings) Ltd V Gulliver*, [1967] 2 AC 134, that directors owe strict fiduciary duties to the company they serve. Chief among these is the duty to avoid conflicts between personal interests and the company's interests. A director, standing in a position of trust and confidence, is prohibited from deriving personal gain by exploiting that position.

27. This fiduciary duty extends beyond the immediate affairs of the company to encompass corporate opportunities. Accordingly, a director must not divert for personal benefit an opportunity that properly belongs to the company, irrespective of whether the company has taken active steps to pursue it. Where a director nonetheless appropriates such an opportunity, the law deems any resulting profit to be held on constructive trust for the company, and the director is obliged to account for the same in restitution.

28. It is further well settled in judicial pronouncements that where a conflict of interest arises, directors are under a positive duty to disclose the same and to obtain the approval of the members before proceeding with the transaction. This principle is affirmed in *Evereedy East Africa Limited V Energizer Middle East and Africa Limited & Another*, [2017] eKLR and *Exobi (Finance House) Limited V Zabid A A Nanji & 2 Others*, [2020] eKLR, where the courts underscored the centrality of transparency and accountability in corporate governance.

29. These authorities are reinforced by statute. Section 143 of the *Companies Act* imposes on directors the duty to promote the success of the company, while Section 146 codifies the obligation to avoid conflicts of interest. Further, Section 150 recognizes that where potential conflicts cannot be avoided, transactions that might otherwise be invalidated may nonetheless be validated through disclosure and the informed consent, approval, or authorization of the members.

30. The evidence before me is not disputed. The CR12 produced by the Defendants shows that Femina, together with her husband, incorporated Travelwise (Kenya) Limited on 23<sup>rd</sup> April 2013. That date is significant: the company was registered one day before Femina was removed as a director of the Company at an Extraordinary General Meeting held on 24<sup>th</sup> April 2013, and nearly a month after she had been served with notice, dated 26<sup>th</sup> March 2013, of the intention to remove her.

31. At the time of incorporation, therefore, Femina was still a director of the Company, owing fiduciary obligations. The timing of the registration strongly suggests a premeditated intention to compete with the Company while she was still bound by duty.

32. This conclusion is fortified by the circumstances surrounding the FV Hotel lease. The evidence shows that the Company's lease was not renewed and that immediately thereafter Femina's new company took over the same premises. Femina had personally managed that branch for over 15 years and had cultivated goodwill and relationships with FV Hotel which, by virtue of her position, properly belonged to the Company. The fact that she incorporated her company just as the lease expired,



- and promptly occupied the premises, imputes an improper motive and demonstrates a diversion of corporate opportunity.
33. The financial consequences were evident. The Company's profits declined steeply immediately after the loss of the FV Hotel lease. It is clear to this Court that Femina was aware of the importance of that lease to the Company's continued success and deliberately exploited her knowledge and position for the benefit of her own enterprise. Even after her removal as a director, Femina remained a shareholder in the Company.
  34. The *Companies Act* envisages that the Memorandum and Articles of Association bind the company and its members as if covenants were made by each member to observe them. The Company's Memorandum obligated members to promote the objects of the Company in a manner calculated to benefit it. By establishing a rival business in the same field, Femina not only breached her fiduciary duties as a director but also failed in her obligations as a shareholder under the Memorandum and Articles.
  35. In the result, I find that Femina's incorporation of Travelwise (Kenya) Limited while still a director was a clear breach of her fiduciary obligations and an act done in conflict with her duties as both a director and shareholder.
  36. Accordingly, Femina is disentitled to the reliefs she seeks. I therefore answer in the negative the issues framed from her claim: the transfer of shares by Klarissa to the Interested Parties is not liable to be nullified; Femina is not entitled to general damages for breach of contract; she is not entitled to damages for lost opportunity; and she is not entitled to exemplary or punitive damages. On the contrary, the evidence firmly establishes that Femina herself was in breach of the Company's Memorandum and Articles of Association by incorporating a competing company while still a director and shareholder.

**Counter Claims of Loss of Profits, Loss of Goodwill and Costs for Relocation and Setting up a New Office:**

37. Having found that Femina was in breach of her fiduciary obligations under the Memorandum and Articles of Association, the next issue is whether that breach occasioned loss to the Company and, if so, the measure of damages recoverable.
38. When a breach affects the operation of a business, the Court must adopt the most appropriate method of quantifying the loss so as to fairly compensate the injured party. Such methods may involve assessing the effect of the breach on the company's profits, the diminution in business value, additional management costs, or loss of goodwill. As Lord Shaw observed in *Watson, Laidlaw & Co Ltd V Pott, Cassels & Williamson*, (1914) SC (HL) 18, this exercise often requires the "application of a sound imagination and the practice of the broad axe".
39. With respect to the claim for loss of profits, it is settled law that such damages are recoverable in actions for breach of contract or fiduciary duty, provided that the claimant discharges the evidentiary burden. The claimant must establish the claim with reasonable certainty, and demonstrate that the loss of profits was both a proximate consequence of the wrongful conduct and within the reasonable contemplation of the parties at the time of contracting. This principle has been affirmed by the Court of Appeal in *Agricultural Development Corporation V Harjit Pandhal Singh & Another*, [2019] eKLR and *Kenya Tourist Development Corporation V Sundowner Lodge Limited*, [2018] eKLR.
40. My understanding of these decisions is that while mathematical exactitude is not required, the evidence must provide a rational basis upon which an award can be made. As was observed in *Kenya Industrial*



*Estates Ltd v Lee Enterprises Ltd*, [2009] eKLR, damages for loss of profits must be specifically pleaded and strictly proved.

41. In the present case, the Company's own audited financial statements, produced by Femina, provide compelling evidence of the deterioration in profitability. The records show that net profits declined precipitously from Kshs. 28 million in 2012 to a paltry Kshs. 566,414/= in 2021. The sharp decline is traceable to 2013, immediately after Femina incorporated her competing company and diverted the FV Hotel opportunity away from the Company. This causal link satisfies both the tests of proximate causation and foreseeability.
42. Based on the Company's historical performance and the lost corporate opportunity, I am persuaded that the Company lost an average of at least Kshs. 5 million in net profits annually over the nine-year period from 2013 to 2021. Guided by the principles I have outlined, and balancing fairness with the available evidence, I assess and award the Company the sum of Kshs. 45 million as compensation for lost profits.
43. The Company also claimed Kshs. 33 million as loss of goodwill, pegged on the value a third party would allegedly have been willing to pay for the Company's business connection with FV Hotel over a ten-year period. However, goodwill is an intangible asset whose loss must be proved by cogent evidence, such as expert valuation or demonstration of diminished reputation, customer loyalty, or brand value.
44. In this case, the Company relied solely on its financial statements without any independent valuation or concrete evidence of erosion of goodwill. The claim is speculative and unsupported. I therefore dismiss the prayer for damages for loss of goodwill.
45. The Company also sought Kshs. 12,957,063/= as costs incurred in relocating and setting up new offices after losing the FV Hotel premises. While I accept that the relocation was directly linked to Femina's diversion of the lease, this head of claim is in the nature of special damages, which must not only be specifically pleaded but also strictly proved by primary evidence such as receipts or invoices.
46. The Company relied on general ledger entries to support the claim for relocation costs. However, general ledgers, being internal management records, cannot by themselves constitute conclusive proof of actual expenditure. As the Court of Appeal emphasized in *Total (Kenya) Limited (formerly Caltex Oil (Kenya) Limited) V Janevams Limited*, [2015] eKLR, claims founded on alleged expenses must be established by strict proof, typically through primary evidence such as receipts to demonstrate the acquisition of goods or services.
47. In the result, I hold that the Company's counterclaim succeeds only in part. The Company has satisfactorily proved its entitlement to damages for loss of profits, which I have assessed at Kshs. 45 million. The claims for loss of goodwill and relocation costs fail for want of proof.

#### **Costs of the Suit and the Counterclaim:**

48. As Femina has been unsuccessful in her claim, it is only just that she bears the costs incurred by the Defendants and the Interested Parties in defending the same. Further, since the Company has been substantially successful in its counterclaim, Femina must also compensate it for the costs expended in prosecuting that claim.

#### **Conclusion and Disposition**

49. Accordingly, I make the following final orders:
  - a. The Plaintiff's suit is hereby dismissed in its entirety.



- b. The 3<sup>rd</sup> Defendant's counterclaim dated 5<sup>th</sup> October 2017 succeeds in part and judgment is entered in favour of the 3<sup>rd</sup> Defendant, Muthaiga Travel Limited, against the Plaintiff, Femina Dawoodia, in the sum of Kshs. 45,000,000.00 being damages for loss of profits.
- c. The Plaintiff, Femina Dawoodia, shall bear and pay the costs of the counterclaim to the 3<sup>rd</sup> Defendant, Muthaiga Travel Limited and the costs of the suit to the Defendants and the Interested Parties.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 26<sup>TH</sup> DAY OF SEPTEMBER 2025.**

**F. MUGAMBI**

**JUDGE**

