



**Trt Investments Limited v Mwalo & 3 others (Civil Case 223 of 2023)  
[2025] KEHC 1822 (KLR) (Commercial and Tax) (27 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 1822 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL CASE 223 OF 2023  
F GIKONYO, J  
FEBRUARY 27, 2025**

**BETWEEN**

**TRT INVESTMENTS LIMITED ..... PLAINTIFF**

**AND**

**BRAMUEL MWALO ..... 1<sup>ST</sup> DEFENDANT**

**XETOVA INC ..... 2<sup>ND</sup> DEFENDANT**

**XETOVA LIMITED ..... 3<sup>RD</sup> DEFENDANT**

**EXTRA DIMENSIONS COMPANY LIMITED ..... 4<sup>TH</sup> DEFENDANT**

**RULING**

**Independent report on affairs of company**

1. This ruling determines the issue of whether the court should adopt the report dated 10<sup>th</sup> October 2023 by Grant Thornton, in place of an inspector's report under section 786 of the [Companies Act](#).

**Background**

2. The plaintiff/ applicant filed this suit against the defendants/ respondents claiming that through a Founder's Agreement dated 18<sup>th</sup> May 2022, it invested USD 1,900,000 in the 3<sup>rd</sup> respondent for 49% shareholding. The agreement also stipulated that the 2<sup>nd</sup> respondent was to own 100% of the 3<sup>rd</sup> respondent. It also disbursed USD 1,480,000 to the 4<sup>th</sup> respondent through loan agreements of 28<sup>th</sup> June 2022 and 16<sup>th</sup> September 2022, allegedly through misrepresentation by the 1<sup>st</sup> respondent.
3. The applicant alleges that the respondents have failed to finalize *the constitution* of a board with directors, formation of an advisory board, review of financials, repayment and accounting for the sums



owed to it. That on 3<sup>rd</sup> February 2023, it received anonymous complaints against the 1<sup>st</sup> respondent, the CEO of the 2<sup>nd</sup> and 3<sup>rd</sup> respondents for corporate malfeasance, erosion and misuse of investor funds, sexual harassment and default in tax obligations. On 16<sup>th</sup> February 2023, it was discovered that the 2<sup>nd</sup> respondent is a tax-delinquent entity in Delaware, USA owing USD 88,168.58. As a result, together with the 1<sup>st</sup> and 3<sup>rd</sup> respondents, it commissioned Grant Thornton to conduct an independent review of the 3<sup>rd</sup> respondent's affairs due to the applicant's concerns and to undertake a capital raise for the 3<sup>rd</sup> respondent.

4. Grant Thornton released its first report on 17<sup>th</sup> April 2023 in which it observed that the 3<sup>rd</sup> respondent's shareholding does not reflect the agreement between it and the 1<sup>st</sup> respondent; that the 1<sup>st</sup> respondent failed to supply a general ledger and bank statements required to authenticate various transactions reported in the 3<sup>rd</sup> respondent's information provided; that the bank statements that were ultimately provided were manipulated; that in some cases there was reluctance to provide documentation to show the generation of income, expenses incurred, payment of taxes, repayments received in respect of the loan advanced to the 4<sup>th</sup> respondent.
5. Based on the first report, the applicant filed an application dated 26<sup>th</sup> May 2023 seeking an order that the court or the deputy registrar (DR) appoint an inspector to interrogate and inspect the accounts and affairs of the respondents and provide a report to the Court.
6. On 26<sup>th</sup> June 2023, the court allowed the application and issued an order appointing an inspector to inspect the affairs of the companies and to report to the court on:-
  - a. Company registration and shareholding of the 3<sup>rd</sup> respondent from 18<sup>th</sup> May 2022 to date.
  - b. Intellectual property registrations.
  - c. Governance and management of the 3<sup>rd</sup> respondent from 18<sup>th</sup> May 2022 to date with respect to allegations of
    - i. Corporate malfeasance
    - ii. Erosion and misuse of investor funding.
    - iii. Sexual harassment.
    - iv. Dishonour of tax obligations to Kenya Revenue Authority of USD 400,000.
  - d. Annual filings made from 18<sup>th</sup> May 2022 to date.
  - e. All bank accounts of the 3<sup>rd</sup> respondent from 18<sup>th</sup> May 2022 to date.
  - f. Investigation into any company associated with the 3<sup>rd</sup> respondent that has been in operation from 18<sup>th</sup> May 2022 to date contemporaneous with the 3<sup>rd</sup> respondent.
  - g. The 3<sup>rd</sup> respondent's operations and bank accounts relating to the contract of 20<sup>th</sup> June 2022 with the 4<sup>th</sup> respondent.

### **The present application**

7. The Notice of Motion dated 12<sup>th</sup> April 2024 is seeking that this court adopt the final investigation report dated 10<sup>th</sup> October 2023, prepared by Grant Thornton, concerning the affairs and management of the 3<sup>rd</sup> respondent in respect of the court order dated 30<sup>th</sup> June 2023. The application is brought under sections 238, 780(1), 782, 786, 787, 789, 797, 1004 (1) (b) and (2), of the [Companies Act](#), 2015, Order 40 Rule 2 and 4 of the Civil Procedure Rules, 2010.



8. The application is based on the grounds in the supporting affidavit sworn by the respondent's compliance and administration manager, Vimla Ramasamy on 12<sup>th</sup> April 2024 and written submissions dated 5<sup>th</sup> June 2024. The grounds are that: -
  1. On 30<sup>th</sup> June 2023, this Court allowed the application dated 23<sup>rd</sup> May 2023 for the appointment of an inspector to interrogate and investigate the affairs of the 3<sup>rd</sup> respondent.
  2. The applicant has unsuccessfully pursued the appointment of an inspector through this court's DR, the Companies Registry and the Attorney General.
  3. Grant Thornton, an accounting firm, jointly engaged by the applicant, the 1<sup>st</sup> and 3<sup>rd</sup> respondents, submitted a final report on 10<sup>th</sup> October 2023 responding to the questions raised in the application dated 23<sup>rd</sup> May 2023.
9. In its submissions, the applicant asserted that Grant Thornton has specialized expertise in forensic accounting and auditing; and that according to Section 786 of the *Companies Act*, the qualification for an investigator appointed by the court is competence to carry out the investigations and that the provision does not provide for a specific list of investigators that can be appointed that is left to judicial discretion, subject to technical competence. The applicant relied on the decision in Fredrick Nthumo Maingi & another v Jones Makau Mutisya & 2 others [2017] eKLR, where the court while allowing an application for the appointment of an investigator, required the parties to present to the court names of two qualified and independent financial audit practitioners for their appointment showing that the investigators can be privately contracted.
10. The applicant also asserted that the respondents are estopped from questioning the report as they had an opportunity to dispute the finding of the initial report during the proceedings in the application dated 23<sup>rd</sup> May 2023 but failed to respond to that application. The 3<sup>rd</sup> and 4<sup>th</sup> respondents have made unsubstantiated allegations of partiality but have not provided any evidence to demonstrate the basis of these claims nor shown the interest Grant Thornton has in the dealings between the parties.
11. The applicant argued that the admission of the report does not necessarily imply that it is binding upon the court; that the report contains both factual and opinion evidence, which would conclude these proceedings as there is no further order required. In support, it relied on the English decisions in Rogers v Howyle (Neutral Citation Number: [2013] EWHC 1409 (QB) and Hoyle v Rodgers (Neutral Citation Number: [2014] EWCA Civ 257).
12. The applicant acknowledged that the *Companies Act* does not contain provisions on the production of an independent private investigation or audit report, but asserted that the Act does not prohibit the adoption of an independently, jointly commissioned report. The applicant also asserted that the court has discretion under Section 3A of the *Civil Procedure Act* to admit the report.

## Responses

13. The application is opposed through: -
  1. The 1<sup>st</sup> respondent's grounds of opposition and written submissions dated 24<sup>th</sup> June 2024 and 19<sup>th</sup> July 2023 respectively;
  2. The 2<sup>nd</sup> respondent's grounds of opposition and written submissions both dated 24<sup>th</sup> June 2024;
  3. The 3<sup>rd</sup> respondent's replying affidavit sworn by its director, Bramwel Mwalo Opiyo on 22<sup>nd</sup> May 2024 and written submissions dated 20<sup>th</sup> June 2024; and



4. The 4<sup>th</sup> respondent's replying affidavit sworn by Wambui Njooora on 20<sup>th</sup> August 2024 and written submissions dated 16<sup>th</sup> October 2024.
14. The central points raised by the 1<sup>st</sup> and 2<sup>nd</sup> respondent against the adoption of the report is that the Final Investigation Report dated 10<sup>th</sup> October 2023 was not prepared by a court-appointed inspector as provided by Section 786(1) of the *Companies Act*. They faulted the applicant for failing to follow up with the relevant bodies to appoint an inspector from 12<sup>th</sup> June 2023 when the order was issued to 12<sup>th</sup> April 2024 when the instant application was filed as they only attached one letter from the DR dated 10<sup>th</sup> July 2023. They claimed that the applicant did not intend to have a report by a court-appointed inspector but to use the report by Grant Thornton. They pointed out that there is no letter from the DR informing the applicant that the pursuit of appointment of an inspector has been unfruitful.
15. The 1<sup>st</sup> and 2<sup>nd</sup> respondents relied on the maxims of equity aids the vigilant not the indolent and equity follows the law. They also relied on the decisions in *Republic v Council of Legal Education & another ex parte Sabiha Kassamia & another* [2018] eKLR for the proposition that there can never be a deviation from statute for a party's convenience; Kings Bench in *Rookey's case*, that exercise of discretion is governed by rules of law and equity.
16. The 3<sup>rd</sup> respondent submitted that the report prejudices the respondents as it was not prepared by an inspector and that it cannot inform the court in an independent, judicious and fair manner of its affairs. It relied on *Gitau v Kenya Methodist University (Kemu) Petition 5 of 2020* [2021] eKLR KEHC 322 (KLR) (8 December 2021). It also relied on *Regina v Special Commissioner and Another, Ex P Morgan Grenfell & Co. Ltd* [2002] UKHL to argue that the applicant's proposal is precluded from consideration by the doctrine of necessary implication.
17. The 4<sup>th</sup> respondent asserted that since the report was not endorsed by an inspector as required by law, the implication of a possibility of collusion between it and the 1<sup>st</sup> respondent is unjustified and unfair. It highlighted that information and documents were not sought from it in the preparation of the report, asserting that if the report is adopted it would be condemned unheard. It relied on *Stephen Kinini Wang'onde v The Ark Limited* [2016] KEHC 3449 (KLR) to argue that the court should not adopt the report in a vacuum and deny itself the opportunity of weighing the accounting firm's opinion against the 4<sup>th</sup> respondent's case and evidence. On the right to be heard, it relied on Article 50 of *the Constitution* and the decisions in *Republic v National Land Commission & 2 others Ex Parte archdiocese of Nairobi Kenya Registered Trustees (St. Joseph Mukasa Catholic Church Kahawa West)* [2018] eKLR and *Mureithi Charles & Daniel Kimutai Cheruiyot v Jacob Atina Nyagesuka* [2022] KEHC 1805 (KLR).

## Analysis and Determination

### Issue

18. Arising from the application, the responses and the submissions is: -
  - a. Whether the court should adopt the report dated 10<sup>th</sup> October 2023 in place of an inspector's report under section 786 of the *Companies Act*.
19. Section 786 of the *Companies Act*, provides in part that: -

“786.



(1) The Court may appoint one or more competent inspectors to investigate the affairs of the company and to report on those affairs in such a manner as the Court directs-...”

20. After hearing an application by the applicant herein, the court, on 26<sup>th</sup> June 2023 ordered appointment of an inspector to inspect the affairs of the company-the 2<sup>nd</sup> respondent- and to report to the court on the matters listed in the order.
21. Such order is made when the court is satisfied there is ‘good reason for requiring the investigation’ of the affairs of the company.
22. The applicant engaged Grant Thornton- an accounting firm- which filed a final report dated 10<sup>th</sup> October 2023 which they seek the court to adopt in place of an inspector’s report under section 786 of the *Companies Act*. The basis for the application is that the applicant has unsuccessfully pursued the appointment of an inspector through this court’s Deputy Registrar, the Companies Registry and the Attorney General.
23. The applicant also argued that Grant Thornton, an accounting firm, was jointly engaged by the applicant, the 1<sup>st</sup> and 3<sup>rd</sup> respondents, submitted a final report on 10<sup>th</sup> October 2023 responding to the questions raised in the application dated 23<sup>rd</sup> May 2023.
24. The 1<sup>st</sup> and 3<sup>rd</sup> respondents denied the said firm was engaged jointly. The record shows that the respondents objected to the preliminary report by Grant Thornton of 17<sup>th</sup> April 2023. Although these objections were not considered by the court in its ruling of 26<sup>th</sup> June 2023, the objections are still on record. Thus, the claim that the said firm of accounting was engaged jointly is not clear at this stage.
25. The applicant only availed a letter from the DR dated 10<sup>th</sup> July 2023 to show its pursuit of the appointment of an inspector was unsuccessful.
26. Investigations on the affairs of a company is a serious undertaking and a judicial tool to ensure hygiene in the formation and running of a company. Borne out of the rubric of the law, investigations of the registration and affairs a company are aimed at;
  - a) preventing and or unearthing formation of companies for unlawful of illegal purposes;
  - b) unearthing or preventing fraud or misfeasance-and identifying the persons involved-to creditors and other persons, and take legal or administrative action;
  - b) preventing oppressive conduct to members;
  - c) obtaining information concealed by the company; and
  - d) in public interest.

It is not strange that corporate vehicle has been used to commit fraud, corruption, economic crimes, terrorism and arms financing and money-laundering, to mention a few.

27. The report herein is said to respond to the issues in these proceedings and the areas identified by the court for investigation. Is it legally permissible?
28. The applicant cited the decision in Fredrick Nthumo Maingi & another v Jones Makau Mutisya & 2 others [2017] eKLR, where the court while allowing an application for the appointment of an investigator, required the parties to present to the court names of two qualified and independent



- financial audit practitioners for their appointment showing that the investigators can be privately contracted.
29. It bears repeating that after finding that there is ‘good reason for requiring an investigation’ on the affairs of the company herein, the court on 26<sup>th</sup> June 2023, allowed the application dated 23<sup>rd</sup> May 2023 for the appointment of an inspector to interrogate and investigate the affairs of the 3<sup>rd</sup> respondent.
  30. The applicant stated that, it has unsuccessfully pursued the appointment of an inspector through the Deputy Registrar (DR) of this court's, the Companies Registry and the Attorney General. Although only a single letter was presented to support this claim, of importance is that there have not been any particular person appointed and committed to inspect the affairs of the company.
  31. The major objections to report by Grant Thornton, an accounting firm, were that; it was not jointly engaged by the applicant, the 1<sup>st</sup> and 3<sup>rd</sup> respondents; it is not a report by a duly appointed inspector; and is prejudicial to the 1<sup>st</sup> and 3<sup>rd</sup> respondent as it was done unilaterally. They claimed they were denied right to fair hearing under article 50(1) of *the Constitution*.
  32. The report is on the affairs of the company. Also, it is not strange to appoint private person qualified to be appointed as inspectors under the *companies Act*. See Fredrick Nthumo Maingi & another v Jones Makau Mutisya & 2 others [2017] eKLR, where the court while allowing an application for the appointment of an investigator, required the parties to present to the court names of two qualified and independent financial audit practitioners for their appointment showing that the investigators can be privately contracted.
  33. There is also no prohibition in the *Companies Act* on appointment of private investigators to investigate or audit a company's affairs.
  34. Similarly, the court has powers to give directions on and cut out the scope of the investigation as well as any particular documents to be inspected or examined which may include any internal or external audits or inspection reports on the affairs of the company.
  35. The court has already found that there is ‘good reason for requiring the investigation’, and has made an order for appointment of an inspector on the affairs of the company herein.
  36. The final report on 10<sup>th</sup> October 2023 responds to the questions raised in the application dated 23<sup>rd</sup> May 2023. The report therefore, forms the basis for interrogation of the issues in these proceedings. The report is adopted as one of the reports on the affairs of the company.
  37. But, to avert any prejudice to the respondents, the court orders the respondents to submit, within 7 days, the name of a person qualified to be appointed as an inspector who shall carry out another investigation/audit of the affairs of the company-2<sup>nd</sup> defendant- in accordance with the order of the court made on 26.6.2023. The person so appointed shall also submit a report of the investigation within 30 days of being formally appointed. He may also refer to or consider the report adopted herein. Once, both reports are filed, the court shall give appropriate directions, including but not limited to, whether there will be need for examination of the makers of the report or appropriate person who may speak to the report or any other relevant person.
  38. In the upshot, the application dated 12<sup>th</sup> April 2024 is allowed in the specific terms above. Costs be in the cause.

Orders accordingly.

**DATED, SIGNED AND DELIVERED AT NAIROBI THROUGH MICROSOFT ONLINE APPLICATION THIS 27<sup>TH</sup> DAY OF FEBRUARY, 2025**



.....

**F. GIKONYO M**

**JUDGE**

In the presence of: -

1. Otiende for the plaintiff/Applicant
2. Orwenyo for the 4<sup>th</sup> defendant/Respondent
3. Ms. Kinuthia for Official Receiver
4. Walela for the 1<sup>st</sup> defendant/Respondent
5. Walela for Muhuyu for the 2<sup>nd</sup> defendant/Respondent
6. Walela for Makau for the 3<sup>rd</sup> defendant/Respondent
7. CA - Kinyua

