



Gheewala (Suing as the Executrix of the Estate of Chandrakant Shamjibhai Gheewala) & 2 others v Gheewala & another (Commercial Case E075 of 2024) [2025] KEHC 4273 (KLR) (Commercial and Tax) (28 March 2025) (Ruling)

Neutral citation: [2025] KEHC 4273 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E075 OF 2024
MN MWANGI, J
MARCH 28, 2025
IN THE MATTER OF NYAKU LIMITED
-AND-
IN THE MATTER OF AN APPLICATION BY A MEMBER OF THE
COMPANY FOR PROTECTION AGAINST UNFAIR PREJUDICE
-AND-
IN THE MATTER OF CONTRAVENTION OF THE COMPANIES ACT NO. 17
OF 2015
-AND-
IN THE MATTER OF CONTRAVENTION OF THE ARTICLES OF
ASSOCIATION OF NYAKU LIMITED
-AND-
IN THE MATTER OF BREACH OF TRUST BY A TRUSTEE HOLDING
SHARES IN TRUST

BETWEEN

MUKTA CHANDRAKANT GHEEWALA (SUING AS THE EXECUTRIX OF THE ESTATE OF CHANDRAKANT SHAMJIBHAI GHEEWALA) 1ST PLAINTIFF
SHRIKESH GHEEWALA 2ND PLAINTIFF
MAMTA GHEEWALA 3RD PLAINTIFF

AND



ELESHKUMAR CHANDRAKANT GHEEWALA 1ST DEFENDANT
NYACITY LIMITED 2ND DEFENDANT

RULING

1. Before me is a Notice of Motion application dated 8th November 2024 filed pursuant to the provisions of Sections 1A, 1B, 3A & 63(e) of the Civil Procedure Act, Order 51 Rule 1 of the Civil Procedure Rules, 2010 and Sections 780 & 782 of the Companies Act No. 17 of 2015. The plaintiffs/applicants seek orders that this Court suspends all resolutions from the Annual General Meeting (AGM) of 20th February 2024 and the Extraordinary General Meeting (EGM) of 17th October 2024, halts the removal of Shrikesh Gheewala as a Director of Nyaku Limited, and maintain his directorship status, restrain the defendants from interfering with or preventing him from performing his duties. The plaintiffs also pray for orders to prevent the defendants from acting on any resolutions passed at the AGMs/EGMs, prohibit the calling or holding of General or Board Meetings without the plaintiffs' consent and restrain the majority shareholders of Nyaku Limited from interfering with the company's management without Court approval pending the hearing and determination of the suit.
2. The application is premised on the grounds on the face of the Motion, and it is supported by affidavits sworn on 8th & 12th November 2024 by Mr. Shrikesh Gheewala, the 2nd plaintiff herein and a Director of Nyaku Limited. He averred that the said company was incorporated in 1978, and its shareholding and directorship are as per the CR-12 dated 16th February 2024. He contended that the defendants issued a Notice for an AGM for 20th February 2024, which was defective due to insufficient Notice period, lack of proper service, failure to follow statutory requirements, and lack of a valid Board resolution. He further averred that in as much as the said meeting proceeded as scheduled, the defendants have to date refused to disclose its minutes.
3. Mr. Shrikesh stated that the defendants later claimed that an Extra Ordinary General Meeting (EGM) on 17th October 2024 removed him as a Director, but no valid Notice was served. He claimed that the removal process did not follow legal requirements and is therefore invalid. He asserted that in the event that the orders being sought are not granted, the defendants may pass resolutions that are harmful to Nyaku Limited and its shareholders, including the potential misappropriation of company assets. He cited a previous unauthorized sale of Nyaku Limited's property as an example.
4. In opposition to the application, the 1st defendant filed a replying affidavit sworn on 30th January 2025 by Mr. Eleshkumar Chandrakant Gheewala, the 1st defendant herein and also a Director of Nyaku Limited. He averred that Nyaku Limited has three shareholders, but the 2nd plaintiff is not one of them. He claimed that the 2nd plaintiff who was a Director of the said company, consistently failed to attend Board meetings, hindering company operations and has withheld company files, making it difficult to complete accounts since 2012. The 1st defendant alleged that the 2nd plaintiff has misappropriated rental income from Nyaku Limited's properties without accounting for it, as a result of which an Annual General Meeting was convened on 20th February 2024, following due process, including personal service, service by registered post, and Newspaper advertisement. He averred that thereafter, an Extraordinary General Meeting was held on 17th October 2024, where a resolution was passed to remove the 2nd plaintiff as a Director of Nyaku Limited and appoint a replacement.
5. The 2nd defendant filed a replying affidavit sworn on 31st January 2025 by Eleshkumar Chandrakant Gheewala, a Director and shareholder of the 2nd defendant he averred that the 2nd plaintiff was removed



as a Director through resolutions passed in an Annual General Meeting held on 20th February 2024, and reaffirmed in an Extraordinary General Meeting held on 17th October 2024. He contended that Notices for the said meetings were issued via registered post, Process Servers, and Newspaper advertisements, but the 2nd plaintiff failed to attend. Mr. Eleshkumar asserted that removal of the 2nd plaintiff adhered to Nyaku Limited's Articles of Association and the [Companies Act](#).

6. The application herein was canvassed by way of written submissions. The plaintiffs' submissions were filed on 30th January 2025 by the law firm of Kimamo Kuria Advocates, the 1st defendant's submissions were filed on 4th February 2025 by the law firm of Nyaanga & Mugisha Advocates, and the 2nd defendant's submissions were filed by the law firm of Ike Owiti & Company Advocates on 3rd February 2025.
7. Mr. Kimamo Kuria, learned Counsel for the plaintiffs cited Section 279 of the [Companies Act](#) and relied on the case of [Njoroge Macharia & another v Registrar of Companies & another Ex Parte & Another](#) [2017] eKLR. He submitted that the Notice for the Annual General Meeting was irregular as it failed to comply with the mandatory procedural requirements outlined under Sections 277 & 278 of the [Companies Act](#). He referred to the case of [Habiba Mohamed Al Amin & 2 others v Standard Chartered Bank of Kenya Limited & 8 others](#) [2020] eKLR, and contended that the said Notice was defective as it provided only 20 days' Notice instead of the required 21 days, contrary to the provisions of Section 281(1) of the [Companies Act](#). Counsel argued that the law mandates that the Notice period must exclude both the day of service and the meeting date.
8. Additionally, Counsel asserted that no valid Notice of the Extraordinary General Meeting for 17th October 2024 was served upon the plaintiffs making the 2nd plaintiff's removal as a Director null and void. Mr. Kimamo Kuria relied on the case of [Mrao Ltd v First Assurance Bank of Kenya](#) [2003] eKLR, cited by the Court in [Florence Kyayanga Musanga v Transnational Bank Ltd & another](#) [2020] eKLR, and submitted that the plaintiff has established a prima facie case with a probability of success. Counsel cited the case of [Banis Africa Ventures Limited v National Land Commission](#) [2021] eKLR, and argued that in the event that the orders being sought herein are not granted, the defendants' actions will cause irreparable harm to the plaintiffs and Nyaku Limited, especially because the defendants have already disposed of Nyaku Limited's assets.
9. Mr. Nyaanga, learned Counsel for the 1st defendant relied on the case of [Giella v Cassman Brown & Company Limited](#) [1973] EA 358 and submitted that the plaintiffs have not met the threshold for being granted the orders sought. He argued that the plaintiffs were rightfully served with Notices for the Annual General Meeting and the Extraordinary General Meeting, thus the said meetings were lawfully convened and all parties were given sufficient notice. He contended that granting the plaintiff the orders sought would unjustly strip the 1st defendant of his shareholder rights and paralyze the company's operations. Counsel asserted that the plaintiffs have not established a prima facie case to warrant being granted the orders sought. Mr. Nyaanga argued that the plaintiffs have not demonstrated that they would suffer irreparable harm if the orders sought are not granted. Further, that since the plaintiffs had the right to attend the meetings but failed to do so, they cannot claim unfair prejudice. He submitted that the balance of convenience tilts in favour of the 1st defendant.
10. Mr. Owiti, learned Counsel for the 2nd defendant relied on the case of [Foss v Harbottle](#) [1848] 2 Hare 261 and submitted that under Section 279(1) of the [Companies Act](#), the defendants had the authority to convene the Annual General Meeting since the company's Directors failed to do so. He argued that proper notice was given to the plaintiffs as required by law, and thereafter the Annual General Meeting was held on 20th February 2024, where resolutions including the removal of the 2nd plaintiff



as a Director, were passed. Mr. Owiti asserted that the 2nd plaintiff was lawfully removed as a Director under Section 139 of the [Companies Act](#).

Analysis and Determination.

11. Upon consideration of the application herein, the grounds on the face of the Motion and the affidavits filed in support thereof, the replying affidavits by the defendants and the written submissions by Counsel for the parties, the issue that arises for determination is whether the instant application is merited.

12. Interlocutory injunctions are provided for under Order 40 Rules (1)(a) and (b) of the [Civil Procedure Rules, 2010](#) which states that –

Where in any suit it is proved by affidavit or otherwise-

- a. that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or
- b. that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the Court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the Court thinks fit until the disposal of the suit or until further orders.

13. It is trite that an injunction is a discretionary remedy that is granted on the basis of sound evidence and applicable legal principles. The principles to be considered by Courts when dealing with an interlocutory injunction application were laid down by the Court in *Giella v Cassman Brown and Co. Ltd* [1973] EA 358 as hereunder -

Firstly, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience.

14. What constitutes a *prima facie* case was defined by the Court of Appeal in [Mrao Ltd v First American Bank of Kenya Ltd & 2 others](#) (*supra*), as follows–

So, what is a prima facie case I would say that in civil cases it is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the Applicant's case upon trial. That is clearly a standard, which is higher than an arguable case.

15. The plaintiffs challenge the legality of the resolutions passed at Nyaku Limited's Annual General Meeting and Extra Ordinary General Meeting on grounds that Notices for the said meetings were not properly served in accordance with the law. The 1st defendant vide a Notice dated 19th January 2024 notified the plaintiffs of Nyaku Limited's Annual General Meeting to be held on 20th February 2024.



The 1st defendant contends that the said Notice was served upon the plaintiffs vide registered post and vide an advertisement in the Standard Newspaper on 30th January 2024.

16. On perusal of the said Notice, it is manifest that it was issued pursuant to the provisions of Section 279(1) of the [Companies Act](#), which states that –

If, after having been required to convene a general meeting under section 277, the Directors fail to do as required by section 278, the members who requested the meeting, or any of them representing more than one half of the total voting rights of all them, may convene a general meeting.

17. The 1st defendant asserted that he issued the said Notice since the 2nd plaintiff has in the past continuously failed to attend any meetings of the company's Directors, has withheld information regarding some of the company's properties, has refused to release company files, thus the company has been unable to make any decisions and/or convene any Annual General Meetings since 2018. It is noteworthy that the plaintiff did not file a further affidavit denying the 1st defendant's allegations, thus I am inclined to believe that Nyaku Limited has not held an Annual General Meeting since the year 2018 contrary to the provisions of Section 275A(1) of the [Companies Act](#).

18. It is not disputed that the defendants are Directors and shareholders of Nyaku Limited holding 48 and 500 shares, respectively, and cumulatively 548 shares of the total 550 shares. This Court finds that the defendants were well within their rights to convene a General Meeting of the company. The plaintiffs submitted that contrary to the provisions of Section 281(1) of the [Companies Act](#), the defendants gave the plaintiffs a 20 days' Notice instead of the requisite 21 days' Notice. Section 281(1) of the [Companies Act](#) provides that –

In convening a general meeting (other than an adjourned meeting), a private company shall give a least twenty-one days' Notice.

19. The plaintiffs submitted that the law mandates that the Notice period must exclude both the day of service and the meeting date. It is now well settled that service by registered post is deemed to be duly served on the date of posting. Therefore, in view of the fact that the Notice for the Annual General Meeting that was scheduled for 20th February 2024 was served on the plaintiffs on 30th January 2024, this Court finds that it was served exactly 21 days before the said meeting was held, and it was in compliance with the provisions of Section 279(1) of the [Companies Act](#). I am therefore persuaded that the Notice dated 19th January 2024 was served in compliance with the provisions of the law.

20. I am cognizant of the fact that pursuant to the provisions of Section 139 of the [Companies Act](#), a company has the right to remove Directors from office by ordinary resolution at a meeting. Section 141 of the [Companies Act](#) however provides for the right of Directors to protest against such removal. Section 141 of the [Companies Act](#) provides that –

1. On receipt of Notice of a Motion for a resolution to remove a Director under section 139, the company shall send a copy of the Notice to the Director concerned.
2. The Director, whether or not a member of the company may be heard on the discussion of the Motion at the meeting.
3. Subsection (4) applies when Notice is given of a proposed resolution to remove a Director under section 139.



4. Within twenty-one days after the Notice is given, the Director may make, with respect to the Motion representations in writing to the company and request that the members of the company be notified of the Director's representations.
21. In this case, the plaintiffs averred that they were not served with the Notice for the Extraordinary General Meeting for 17th October 2024. Further, in as much as the defendants contend that the said Notice was served upon the plaintiffs, there is no evidence of service of the same upon the 2nd plaintiff whom they sought to remove as a Director of Nyaku Limited.
22. I am therefore persuaded that the plaintiffs have established a prima facie case with a probability of success.
23. On the issue of whether the plaintiffs can adequately be compensated by an award of damages in the event that the orders being sought are not granted, I am not persuaded that this is the case since the plaintiffs have demonstrated that the defendants are in breach of Sections 139 & 141 of the Companies Act. To this end, I concur with the Court's finding in the case of Said Ahmed v Mannasseh Benga & Another [2019] eKLR where it was held that -
- Where it is clear that the defendant's act complained of is or may very well be unlawful, the issue of whether or not damages can be an adequate remedy for the plaintiff does not fall for consideration. A party should not be allowed to maintain an advantageous position he has gained by flouting the law simply because he is able to pay for it. Support for this view is to be found in the Court of Appeal decision in the case of Aikman v Muchoki (1984) KLR353.'
24. It is also now well settled that where there is breach of the law, an applicant cannot be compelled to accept damages as compensation. This position was espoused by the Court in Joseph Siro Mosioma v Housing Finance Company of Kenya Limited & 3 others [2008] eKLR, as follows -
- ...that damages is not automatic remedy when deciding whether to grant an injunction or not. Damages is not and cannot be substituted for the loss which is occasioned by a clear breach of the law, in any case, the financial strength of a party is not always a factor to refuse an injunction. More so a party cannot be condemned to take damages in lieu of his crystallized right which can be protected by an order of injunction.
25. Having found that the 2nd plaintiff's rights under Section 141 of the Companies Act were infringed, this Court holds that damages cannot adequately compensate the plaintiffs in the event that the orders sought are not granted and the plaintiffs' suit is successful.
26. The issue of balance of convenience does not arise since I am not in doubt. Nevertheless, based on the analysis I have made, the balance of convenience tilts in favour of the plaintiffs.
27. My finding is that the instant application is merited. As a result, I issue the following orders pending the hearing and determination of the suit amongst the parties herein -
- i. All resolutions from the Extraordinary General Meeting of 17th October 2024 are hereby suspended;
 - ii. An order is hereby issued halting the removal of the 2nd plaintiff as a Director of Nyaku Limited. His directorship status is hereby maintained;
 - iii. The defendants are hereby restrained from interfering with or preventing the 2nd plaintiff from performing his duties. They are also prevented from acting on any resolutions passed at the Extraordinary General Meeting of 17th October 2024;



- iv. The defendants are hereby prohibited from calling or holding any General or Board meetings without the plaintiffs' consent;
- v. The majority shareholders of Nyaku Limited are hereby restrained from interfering with the company's management without Court approval; and
- vi. Costs shall be in the cause.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 28TH DAY OF MARCH 2025.
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

NJOKI MWANGI

JUDGE

In the presence of:

Mr. Kimamo Kuria for the plaintiffs/applicants

Ms Kale h/b for Mr. Nyaanga for the 1st defendant/1st respondent

Mr. Owiti for the 2nd defendant/2nd respondent

Ms B. Wokabi - Court Assistant.

NJOKI MWANGI, J.

