



Washer v Negawatt Limited; Maina (Interested Party) (Miscellaneous Civil Application E703 of 2022) [2024] KEHC 751 (KLR) (Commercial and Tax) (26 January 2024) (Ruling)

Neutral citation: [2024] KEHC 751 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS CIVIL APPLICATION E703 OF 2022
MN MWANGI, J
JANUARY 26, 2024
IN THE MATTER OF NEGAWATT LIMITED
AND
IN THE MATTER OF AN ORDER ALLOWING THE CONVENING OF AN ANNUAL
GENERAL MEETING UNDER SECTION 280 OF THE COMPANIES ACT 2015**

BETWEEN

MARK ANDREW WASHER APPLICANT

AND

NEGAWATT LIMITED RESPONDENT

AND

MARGARET WACERA MAINA INTERESTED PARTY

RULING

1. Through a Notice of Motion amended on 29th September, 2022, brought under Sections 1A, 1B, 3A of the *Civil Procedure Act*, Section 280 of the *Companies Act* (No 17 of 2015) and Order 51 Rule 1 of the *Civil Procedure Rules*, the applicant seeks the following orders-
 1. Spent;
 2. That the Honourable Court be pleased to make an order for convening, holding and conducting an Annual General Meeting of the respondent virtually within 7 days of the order to consider the agenda set out in the respondent’s Special Notice cum Notice of AGM dated 11th August, 2022 and that one member of the company present at the Annual General



Meeting shall constitute a quorum notwithstanding the provisions of Articles 13 and 14 of the Articles of Association of the respondent;

3. That the Honourable Court be pleased to make an order for the convening of a Board meeting of the respondent virtually within 7 days of the Annual General Meeting to consider the proposed transfer by the applicant of 45 of his shares to Michael John Washer and that one Director present at the Board meeting shall constitute a quorum notwithstanding the provisions of Articles 32, 33 and 34 of the Articles of Association of the respondent; and
4. That the costs of this application be borne by the interested party.
2. The application is supported by the grounds on the face of it, the supporting affidavit and a further affidavit sworn by the applicant on 29th September, 2022 and 1st November, 2022, respectively. In a summarized form, the grounds are that the respondent is a private company registered on 5th November, 2014 under the *Companies Act* (Cap 486) (Repealed) to carry on engineering business. That the applicant, a qualified Engineer, is a Director and doubles up as the Managing Director of the company that the interested party is also a Director of. The two are also shareholders of the respondent company, where the applicant holds 600 ordinary shares, whereas the interested party holds 400 ordinary shares. Due to a quorum hitch caused by the interested party's unexplained and unjustified non-attendance of several company Board and general meetings despite being served with notices, the company has been unable to conduct important business and is in contravention of Section 278(1) (b) of the *Companies Act*.
3. On 1st March 2023, the respondent (hereinafter referred to as the "company" indicated to the Court that it did not intend to respond to the instant application. The application is opposed by the interested party who filed a replying affidavit sworn on 4th October, 2022.
4. The application was canvassed through written submissions. The applicant filed his written submissions dated 27th July, 2023. The interested party filed her written submissions dated 25th July, 2023.

Applicant's case

5. The applicant intimated that his relationship with the interested party deteriorated leading to the divorce proceedings in Divorce Cause No 11 of 2018, through which he obtained a Decree Absolute on 2nd March, 2021. He subsequently obtained a protection order issued on 5th August, 2022 against the interested party due to physical assaults.
6. Under the Provisions of Sections 277 and 278 of the *Companies Act* (No 17 of 2015), the applicant through a letter dated 10th August, 2022, applied for the company to convene and hold an Annual General Meeting. The ordinary resolutions for consideration as set out are, removal of the interested party as a Director of the company and the transfer 45 of the applicant's ordinary shares to his father, Michael John Washer, without the prior exercise of pre-emption rights pursuant to Article 10(b) of the company's Articles of Association which require the approval of the Board with a quorum of 2.
7. The applicant convened an Annual General Meeting (AGM) which was to be held virtually on 13th September, 2022 at 10.00 a.m., through Google Meet. The applicant served a notice of the meeting dated 11th August, 2022 upon the interested party by an advance copy by email and through registered post. The applicant also served the interested party with a special notice, in compliance with Section 139 of the *Companies Act*, for making and delivery to the company of her representations on the proposal for her removal as a Director.



8. On 13th September, 2022, the applicant attended the AGM at 10.00 a.m., but the meeting could not proceed due to the interested party's non-attendance, hence the meeting was adjourned to 22nd September, 2022 at 10.00 a.m., to be held through the same Google Meet link. The notice of the adjourned meeting was duly served on the interested party. The interested party again failed to attend the adjourned AGM on 22nd September, 2022 without apology. Due to lack of quorum, the meeting was further adjourned to the 29th September, 2022 at 10.00 a.m., to be held through the same Google Meet link. Notices of the adjournment were served on the interested party. Through a letter dated 28th September, 2022, the interested party demanded cancellation of the AGM. The applicant however attended the adjourned AGM on 29th September, 2022, claiming that the interested party was absent without apology.
9. The interested party contended that this matter is *sub judice*. The applicant faulted the interested party for failure to raise this issue in its pleadings. Nonetheless, the applicant responded to the said contention by asserting that the matter is not *sub judice* because the case of Margaret Wacera Maina v Mark Andrew Washer and Negawatt Limited (HCCOMM/E385/2022) was filed on 4th October, 2022 after the instant matter had been filed, and the said case filed by the interested party herein was declared *sub judice* and stayed by Hon. Lady Justice Mshila through a ruling dated 8th November, 2022. The applicant stated that the said ruling has not been challenged on appeal or review.
10. In urging this Court to allow the application as prayed, the applicant submitted that this Court has jurisdiction to intervene where a member or Director refuses to attend a Board or general meeting deliberately to deny a company quorum. The applicant argued that Section 278(1) (b) of the Companies Act applies in this instance since a quorum of 2 is required for both Board meetings and Annual General Meetings under Articles 33 and 13 of the company herein.
11. The applicant contended that there is no reason why the company should be denied leave to convene and hold an AGM and Board meeting as prayed, as the validity of the applicant's requisition to the company under Sections 277 and 278 of the Companies Act has not been challenged. Relying on the case of Foss v Harbottle (1843) 67 ER189, the applicant argued that the resolutions to be considered are solely within the jurisdiction of the AGM and Board meeting of the company. He also contended that the Court cannot whether through a miscellaneous application or main suit make such decisions on behalf of the company.
12. The applicant relied on the decision in Seruji Limited v Savannah Cement Limited; Savannah Heights Ltd (Interested Party)(Miscellaneous Application E445 of 2021) [2021] eKLR, to the effect that the rationale behind the provisions of Sections 277 and 278 of the Companies Act is that a company should be allowed to get on with managing its own affairs, and should not be frustrated by the impracticability of convening, calling and/or conducting a general meeting in the manner prescribed by the Articles of Association of the company or the Companies Act.
13. The applicant also relied on the decision in In Re El Sombrero Limited [1958] 3 WLR 900, cited with approval in Radio Frequency Systems (EA) Limited & another v Simon Horner & 2 others [2020] eKLR, to support the proposition that provisions on quorum should not be regarded as a right vested in the minority to frustrate the wishes of the majority.

Interested Party's Case.

14. The interested party's core depositions were that the applicant flouted the due process of the law by purporting to remove her as a Director in the company; that the applicant also transferred some of his shares to his father who resides in Canada and appointed him as Director, but the Business Registration



Service found the changes illegal and reverted the company to the position before the disputed changes; that the applicant kept her out of all accounts of the company so that he could perpetrate illegal/unapproved dealings. She also alleged that the applicant removed her as a CFC Bank Account signatory where he is a single signatory making him use the company account as a personal account and according himself excessive financial benefits, tax evasion and money laundering. She claimed that he has illegally held back her salary since the year 2018 and that he fraudulently transferred ownership of the company vehicles to himself and sold them.

15. The interested party submitted that the instant application is not in the best interest of the company. She contended that the application has been brought with an ulterior motive of passing a resolution for the purposes of removing, frustrating and denying her rights as a Director of the company.
16. According to the interested party, the applicant has been intentionally excluding her in running the company's affairs contrary to the company's bona fide interest. She claimed that from the year 2018, the applicant has denied her the right both as a Director and shareholder to access the company's book of accounts, share in profits and make any decisions in regard to the management of the company. She asserted that the applicant's actions are and have been in breach of fiduciary duties of good faith and loyalty and a duty of care and skill in the discharge of his duty as a Director. She also argued that the applicant has approached this Court with unclean hands to sanitize his illegal actions. In support of the said arguments, the interested party relied on Sections 143 and 145 of the Companies Act and Goer's Principles of Modern Company Law (4th Ed.) at p. 571.
17. In addition, the interested party relied on the decision in Carnavale Vincent Michael & 2 others v Mobamed Hanif Majothi (Suing through his Proxy) Abdul Azim Anwarali Kassam Ismail [2021] eKLR, to the effect that the bona fide concern of any member of a company is for the company to run in accordance with the law and the memorandum and articles of association, and in the best interest of the company and its members. The interested party stated that in the said case, the Court also found that it was improper for the applicant to run the company to the exclusion of the respondent who held 50% shares as neither majority nor minority dictatorship in the affairs of a company is good. For these reasons stated by the interested party, she urged this Court to strike out the application.

Analysis and Determination.

18. Having considered the application, the grounds in support of it, the supporting affidavit and the affidavit in response to the application, together with the rival submissions and authorities, the issues arising for determination are-
 - (1) Whether this matter is *sub judice* in view of the existence of HCCC E385 of 2022
 - (2) Whether the applicant has made out a case for grant of the orders sought.
19. On the first issue, the interested party contended that this matter is *sub judice* due to the pendency of the case of Margaret Wacera Maina v Mark Andrew Washer & Negawatt Limited (HCCOMM E385/2022) where she is seeking enforcement and protection rights as a Director and shareholder of the company on account of the applicant's actions. To bolster her argument, she relied on Sections 5 and 6 of the Civil Procedure Act. She also relied on the decisions in David Ndiu & others v Attorney General & others [2021] eKLR on the rationale behind the *sub judice* rule and in Kenya Bankers Association v Kenya Revenue Authority [2019] eKLR, for the proposition that the principle of *sub judice* concerns the matter in issue and not the prayers sought.
20. Although the applicant blamed the interested party for failure to raise this issue in her pleadings, he however submitted on the issue by contending that this matter is not *sub judice* as the case of Margaret



Wacera Maina v Mark Andrew Washer and Negawatt Limited (HCCOMM/E385/2022) was filed on 4th October, 2022, after the instant matter, and HCCOMM/E385/2022 was declared *sub judice* and stayed by Hon. Lady Justice Mshila through a ruling dated 8th November, 2022, which has not been challenged on appeal or by review.

21. [Black's Law Dictionary](#), 8th Edition defines *sub judice* as follows-

“Latin-under a judge. A matter or case that is before a judge or court for determination.”

22. Section 6 of the [Civil Procedure Act](#) addresses the issue of when a suit can be termed as being *sub judice*, in the following terms-

“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.” (emphasis added).

23. I have looked at the Court record and confirmed that the case of Margaret Wacera Maina v Mark Andrew Washer and Negawatt Limited (HCCOMM/E385/2022) was instituted by the interested party on 4th October, 2022, subsequent to the filing of this matter. I also note that among the orders sought by the interested party in the plaint in the said case are-

a) A declaration that the removal of the plaintiff as Directors or any attempt thereof by the Defendants is/was unlawful, irregular and unprocedural.

b) A permanent injunctive order against the Defendants from locking the Applicant out of the company premises and/ or denying the Plaintiff free access to the company's premises and/or interfering with the Plaintiff's performance of his duties as a Director of Negawatt Company Limited pending the hearing and determination of this application, and of the suit herein.

c) That this honourable court be pleased to issue an injunction against the Defendants either by themselves or their agents' employees or any persons howsoever working under their direction or instructions from changing, altering or in any way interfering with the shareholding and directorship of Negawatt Company Limited.....”

24. It is also clear that on 8th November, 2022, Hon. Lady Justice Mshila delivered a ruling in the above matter, and allowed the application by the defendants (applicant and the company herein), dated 1st November, 2022. In effect, the Court stayed the proceedings in that suit for being *sub judice* in consideration of this matter and HCCC No E412 of 2018. To my mind, the instant matter cannot be res *sub judice* due to the orders for stay of proceedings granted in Margaret Wacera Maina v Mark Andrew Washer and Negawatt Limited (HCCOMM/E385/2022).

25. The 2nd issue is whether the applicant has made out a case for being granted the orders sought. The present application has been brought under the provisions of Section 280 of the [Companies Act](#), 2015. That Section provides as follows-

“(1) This section applies if for any reason it is impracticable-



- a. To convene a meeting of the company in any manner in which meetings of that company may be convened; or
 - b. To conduct the meeting in the manner required by the articles of the company or this Act.
- (2) The Court may, either on its own initiative or on the application-
- a. of a director of the company; or
 - b. Of a member of the company who would be entitled to vote at the meeting, make an order requiring a meeting to be convened, held and conducted in any manner the Court considers appropriate.
- (3) If an order is made under subsection (2), the Court may give such ancillary or consequential directions as it considers appropriate.
- (4) Directions given by the Court under subsection (3) may include a direction that one member of the company present at the meeting be regarded as constituting a quorum.
- (5) A meeting convened, held and conducted in accordance with an order under this section is taken for all purposes to be a meeting of the company properly convened, held and conducted”. (emphasis added).
26. In *Radio Frequency Systems (EA) Limited & another v Simon Horner & 2 others* [2020] eKLR, Hon. Tuiyott J., (as he then was), in noting that the substance of Section 280 of the *Companies Act*, 2015 is similar to Section 371 of the English *Companies Act*, 1985, made the following observation-
- “ 4. It would seem that the overarching purpose of section 280 is to provide an inexpensive and speedy procedural remedy to overcome technical difficulties in a company convening, holding or conducting a meeting. It aids in the proper management of a company in the face of technical obstacles. Lately, and in the plight of unprecedented challenges presented by the Covid pandemic, the provisions have been invoked to order for convening, holding and conducting of virtual meetings even where articles of companies did not provide.”
27. Additionally, in a decision from Jersey in the case of *In the Matter of Inter-Channel Pharmaceuticals Ltd* [2002] JRC 116A (10 June 2002), cited with approval in *Radio Frequency Systems (EA) Limited & another v Simon Horner & 2 others* (*supra*), the Court stated as follows-
- “We have been referred to three English Authorities namely, *In Re El Sombrero Limited* [1958] 3 WLR 900, *In Re H.R. Paul & Son Limited (1974) 118 SJ 166*, and *In Re Opera Photographic Ltd* [1989] 1 WLR 634. In *Re El Sombrero* made it clear that the question raised by the word "impracticable" in the statutory provision is merely whether, in the particular circumstances of the case, the desired meeting of the company could as a practical matter be conducted. The case went on to hold that, if it was impracticable, a discretion then arose in the court as to whether it should make an order as sought. In the *El Sombrero* case the applicant held 90% of the shares and the two respondents the remaining 10%. They were also the only directors. By absenting themselves from any meeting they were effectively preventing the majority shareholder from exercising the rights attaching to his



90% shareholding to change the board of directors. The court made an appropriate order to convene a meeting and allow it to proceed in the absence of the quorum required by the articles.

10. In all three English decisions to which we have been referred the court in effect made it clear that the quorum provisions should not be regarded as a right vested in the minority to frustrate the wishes of the majority. The facts in *In Re Opera Photograph Limited* were very similar to those in the present case. The majority shareholder wished to dismiss a director, but was prevented from doing so because the director, who was also the other member, declined to attend the meeting of members so that the meeting was without a quorum.

11. In our judgment the principles to be extracted from the above three English cases are equally applicable in Jersey in relation to Article 94 of the 1991 Law. We conclude on the facts of this case that it is indeed impracticable, within the meaning of Article 94 (1), to conduct the relevant meeting because of the failure of Mr Oguz to attend and form a quorum.”

28. Hon. Mabeya J, in *Seruji Limited v Savannah Cement Limited; Savannah Heights Ltd (Interested Party)* (Miscellaneous Application E445 of 2021) (*supra*), allowed a similar application and cognizant of the above decisions, rehashed the principles thus-

“I do reiterate the foregoing here and add that, the provision was intended to enable company business which needs to be conducted at a general meeting of the company to be so conducted notwithstanding the impediment that might be there. The intention of the Legislature was that a company should be allowed to get on with managing its own affairs, and should not be frustrated by the impracticability of convening, calling and/or conducting a general meeting in the manner prescribed by the Articles or the Act.”

29. Applying the above principles to this matter, I find that it is has become impracticable for an AGM of the company to be held because of failure of the interested party to attend and form a quorum. I also find that the applicant has properly invoked this Court’s jurisdiction to enable the company to continue to operate its business unrestricted by the impracticability brought about by the provisions of its Articles of Association as to the quorum.

30. The interested party does not dispute that the applicant holds 600 shares in the company. There is therefore no question as to his right to invoke this Court’s jurisdiction. If anything, he is the majority shareholder in the company. I am as such inclined to agree with the applicant that as was established in *Foss v Harbottle* (1843) 2 Hare 461, this Court cannot interfere with the internal affairs of the company as per the proposed resolutions, unless the interested party establishes that there are exceptions to the rule.

31. In this respect, the Court of Appeal in *Amin Akberali Manji & 2 others v Altaf Abdulrasul Dadani & another* (Civil Appeal No 101 of 2004) [2015] eKLR, cited Jenkins L.J., who restated the rule in *Foss v Harbottle* (*supra*), in *Edwards v Halliwell* (1950) All ER 1064 as follows-

“The rule in *Foss-v-Harbottle*, as I understand it, comes to no more than this. First, the proper Plaintiff in an action in respect of a wrong alleged to be done to a company or association of persons is prima facie the company or the association of persons itself. Secondly, where the alleged wrong is a transaction which might be made binding on the company or association and on all its members by a simple majority of the members, no individual member of the



company is allowed to maintain an action in respect of that matter for the simple reason that if a mere majority of the members of the company or association is in favour of what has been done, then cadit quaestio; or if the simple majority challenges the transaction, there is no valid reason why the company should not sue.”

32. The applicant has shown that he duly served on the interested party the notices for the AGM and the adjourned meetings. Although the interested party issued a demand on 28th September, 2022 to call off the adjourned meeting scheduled to take place on 29th September, 2022, she has not disputed that she was served with the notice of the said meeting. As was stated In the Matter of Inter-Channel Pharmaceuticals Ltd (supra), quorum provisions should not be regarded as a right vested in the minority to frustrate the wishes of the majority.
33. In regard to the interested party’s contention that the applicant breached his fiduciary duties to the company and acted fraudulently by removing her as a Director and a bank account signatory, it is my considered view that these issues shall be best addressed by the Court before which they are pending trial.
34. The upshot is that the application amended on 29th September, 2022 is merited. It is hereby allowed in the following terms: -
 - i. Leave is hereby granted to the respondent to hold an Annual General Meeting virtually within fourteen (14) days of this order to consider the agenda set out in the respondent’s Special Notice cum Notice of an Annual General Meeting dated 11th August, 2022 and that one member of the company present at the Annual General Meeting shall constitute a quorum notwithstanding the provisions of Articles 13 and 14 of the Articles of Association of the respondent;
 - ii. Leave is hereby granted to the respondent to hold a Board meeting of the respondent virtually within seven (7) days of the Annual General Meeting to consider the proposed transfer by the applicant of 45 of his shares to Michael John Washer and that one Director present at the Board meeting shall constitute a quorum notwithstanding the provisions of Articles 32, 33 and 34 of the Articles of Association of the respondent herein;
 - iii. Pursuant to Section 280(3) and (4) of the *Companies Act*, upon service of a notice of the Board meeting of not less than three (3) days being effected on the interested party in any manner provided for by law, the applicant shall constitute a quorum; and
 - iv. Each party will bear his/her own costs since the applicant and the interested party are former spouses.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 26TH DAY OF JANUARY, 2024.
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

NJOKI MWANGI

JUDGE

In the presence of:

Mr. Wachira for the applicant

Mr. Munene for the interested party

No appearance for the respondent



Ms B. Wokabi – Court Assistant.

