



REPUBLIC OF KENYA



KENYA LAW

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Periasamy v Shri Gayatri Borewell (K) Limited & 4 others (Civil Case E003 of 2022) [2024] KEHC 5345 (KLR) (26 April 2024) (Ruling)

Neutral citation: [2024] KEHC 5345 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL CASE E003 OF 2022**

MW MUIGAI, J

APRIL 26, 2024

**IN THE MATTER OF: SECTIONS 103,114,505,662,693
AND 710 OF THE COMPANIES ACT NO. 17 OF 2015**

AND

IN THE MATTER OF: RECTIFICATION OF THE COMPANY REGISTER

AND

IN THE MATTER OF: ISSUING OF SHARE CERTIFICATE

AND

IN THE MATTER OF: RIGHTS OF A MEMBER

AND

IN THE MATTER OF: SHRI GAYATRI BOREWELL(K) LIMITED

AND

IN THE MATTER OF: THE COMPANIES (HIGH COURT) RULES

BETWEEN

SAMINATHAN PERIASAMY PETITIONER

AND

SHRI GAYATRI BOREWELL (K) LIMITED 1ST RESPONDENT

VIPUL MEGHJIBHAI GHELANI 2ND RESPONDENT

DIPAKKUMAR MANUBHAI PATEL 3RD RESPONDENT

KAMLESHKUMAR JAYANTIBHAI PATEL 4TH RESPONDENT

REGISTRAR OF COMPANIES 5TH RESPONDENT



RULING

1. The petition dated 22nd February 2022 the Petitioner sought the following orders that:
 - a. Pending the hearing and determination of the petition, interlocutory orders be issued as prayed in terms of the notice of motion filed herewith
 - b. A declaration that the petitioner is a shareholder of the company with proprietary rights to 150,000 paid up ordinary shares
 - c. A declaration that failure by the company official to supply the petitioner with share certificates as evidence of shareholding is a breach of Sections 505 of the Companies Act 2015.
 - d. A declaration that the alteration of the company's register leading to the reduction of the petitioner's shareholding and subsequently deleting of the petitioner's name from the register of the Company's shareholders was fraudulent and /or unprocedural.
 - e. This honourable Court be pleased to issue an order directing the Company through its official to issue the petitioner with share certificates recognizing proprietary rights over 150,000 ordinary shares of the company within 10 days from the date of the decree.
 - f. This Honorable Court be pleased to direct the registrar of companies to rectify the company's register of members by adding the petitioner's name therein and particulars
 - g. This Honorable Court be pleased to direct the registrar of Companies to rectify the Company's register of members by adding the petitioner's shareholding of 150,000 ordinary shares.
 - h. A declaration that a quasi- shareholder's agreement resulted in equity from the oral agreement between the shareholders, the company and its official as to the company's capital financing agreement
 - i. A declaration that the petitioner, by transferring money to the Company and or its officials to the tune of Kshs. 5,980,000 fulfilled his obligation under the quasi-shareholder loan agreement.
 - j. A declaration that quasi- shareholder's agreement is frustrated for want of form.
 - k. A declaration that the quasi-shareholder agreement, having been frustrated for want of form, the company was unjustly enriched and it should restitute the petitioner the sum of kshs 5,980,000 plus interest.
 - l. This Honorable Court be pleased to enter judgement for the petitioner against the company and its officials jointly and severally for the sum of Kshs 5,980,000 plus interest
 - m. In the alternative and without prejudice to the foregoing a declaration that, by conduct of parties, a constructive trust was formed between the petitioners and the respondents and on receipt of the sum of kshs 5,980,000 by the respondents, a debenture resulted in equity.
 - n. A declaration that further to the above, that the resulting debenture is a security in favour of the petitioner against the company.



- o. This honourable court be pleased to issue an order directing the company and its officials to issue the petitioner with a debenture certificate recognizing the petitioner's financial capital investment of kshs 5,980,000 as a security against the company for the benefit of the petitioner within 10 days from the date of the decree
- p. Such further orders as the Honourable court deems mete and just
- q. Costs of the petition be awarded to the petitioner.

Replying Affidavit

2. The Respondents on their Replying Affidavit dated 31st March 2022, and filed in court on 6th April, 2022 sworn by Dipakkumar Manubhai Patel on behalf of the 2nd and 4th Respondents, wherein he deposed that the petitioner was an employee of the 1st Respondent until he resigned voluntarily on 7th September 2021 by offering a resignation letter together with a discharge agreement discharging the 1st respondent from any claim arising from his employment or shares
3. Further he deposed that upon the petitioner's resignation, the 1st respondent conducted an audit which revealed that the petitioner had misappropriated funds in the sum of kshs 12,000,000 which he failed to account for and when was demanded from, he threatened to report the 1st respondent to Kenya Revenue Authority
4. That then the petitioner threatened to kill him and one of the shareholders which was reported to Machakos Police Station and in bid not to pay the kshs 12,000,000, the petitioner instructed his advocates to counter demand a sum of kshs 14, 190,000 owed to him on account of unfair termination.
5. He deposed that the petitioner resigned voluntarily, discharged the 1st respondent from any claim arising out of employment and transferred his shares to the incoming director and further requested that his name be removed from the register of members.
6. Therefore, his claims are an afterthought aimed at distracting the 1st respondent from claiming from him the sum of kshs 12,000,000 he misappropriated during his tenure as its director and that the petitioner ceased to be a member of the 1st respondent when he sold his shares to the incoming director and thus his claim for debenture certificate for a sum of kshs 5,980,000 cannot arise.
7. It was lamented that the claim by the petitioner that the respondents deleted his name from the company's shareholding register were baseless since he sold his shares to the incoming director and even requested the respondents to remove his name from the register of shareholding and that the petition is an afterthought, fatally defective and does not meet the legal threshold for grant of such orders
8. The petition was termed as an abuse of the court process and lacking merit and that the same should be dismissed with costs to the respondents.
9. The respondents filed a counterclaim in which they stated that they counter claimed against the petitioner for a sum of kshs 12,000,000 being the amount paid to his personal bank and mpesa by various clients for drilling boreholes in Maua Meru County
10. The matter was canvassed by written submissions.



Submissions

The Petitioner's Submissions

11. The petitioner filed his submissions where counsel for the Applicant raised the following issues for determination:
 - a. Whether the petitioner is a shareholder of the Company with a proprietary right to 150,000 shares
 - b. Whether the company should issue the petitioner with a share certificate for 150,000 share
 - c. Whether the transfer of the petitioner's share was fraudulent
 - d. Whether if (c) above to the affirmative, orders for rectification of the register should issue,
 - e. Whether there was a shareholding agreement between the company's shareholders
 - f. Whether the petitioner's capital contribution should be construed as a debenture in equity
 - g. Whether if (f) above to the affirmative, an order for allotment should issue and the petitioner be issued with a certificate.
12. It was submitted that the petitioner was the original member and shareholder of the 1st respondent with 150,000 shares which has not been disputed or rebutted by the respondents thus the issue had been admitted and proved by both parties
13. Reliance was made to section 496 of the *Companies Act* on the duty of the company to issue a share certificate and urged the court to find that the company was in breach of section 496 and that it issues an order that the company issue the petitioner with a share certificate
14. It was the position of the applicant that he did not transfer his shares and the alleged transfer certificate was a forgery where the forensic document examiner concluded that the purported signature of the petitioner is a forgery in which the respondents have not produced any evidence to rebut the conclusions of the document examiner's report.
15. Reliance was made to the case of Walsh vs Lonsdale (1882) to buttress the maxim of equity that equity will consider that something has been done if the court believes it ought to be done. Reliance was also made to sections 496 and 572 of the *companies Act*.
16. The petitioner urged the court to make declarations and orders as prayed.

The Respondent's Submissions

17. The respondents via their submissions dated 22nd September deposed that the issues for determination were whether the petitioner voluntarily transferred his shares, whether the petitioner is entitled to the prayers sought and whether the respondents are entitled to the prayers as per the counter claim and who should bear the cost of the suit.
18. It was submitted that the allegations that the share transfer was forged cannot be further from the truth as the petitioner reported the forgery claims to the Directorate of Criminal investigations who did not find any evidence to institute forgery charges against the respondents and that in the case there were two conflicting reports of experts one from the document examiner and the other from the DPP.



19. Reliance was placed in the case of Kenya Ports Authority v Modern Holdings [E.A] Limited [2017] to buttress that in case of two conflicting opinions, it is the duty of court to consider the evidence and make its own opinion.
20. It was submitted that the report tendered in court by the petitioner is questionable for a number of reasons, first the timelines for preparation of the report reeks of intention of being sought solely for the purpose of vindicating and validating the petitioner's allegation that the transfer of shares was forged.
21. Reliance was made to the case of Christopher Ndaru Kagina v Esther Mbandi Kagina & another [2016] eKLR and in re Estate of Lihasi Bidali (deceased) on the issue of expert opinion
22. It was submitted that the document examiner was solely instructed by the petitioner late into the case which is indicative of bias and the document examiner did not inspect the original transfer form but only relied on a copy which created doubt.
23. Reliance was made to the case of Kenya Ports Authority vs Modern Holdings {E.A} Limited [2017] eKLR: Civil appeal No. 108 of 2016 as quoted with approval in the case of Iskorostinskaya Syetlana & another vs Gladys Naserian Kaiyoni [2019] eKLR.
24. It was therefore submitted that the documentary report does not hold water and that the respondents had shown on a balance of probability that the petitioner did sign the share transfer forms transferring his shares in the company to one Kajal Miraj Panchami.
25. On whether the petitioner is entitled to the prayers sought, it was submitted that share certificate can only be issued to a member of the company and the petitioner having relinquished his membership to the company through voluntary transfer of shares cannot therefore ask to be issued with a share certificate.
26. On Quasi shareholder's agreement, section 107 of the *Evidence Act* that the burden of proving that there existed a quasi-shareholders agreement was on the petitioner and has not discharged this burden of proof. The petitioner supplied illegible documents and cannot be considered as proof of the petitioner's allegation for deposit of Kshs 5,980,000. Reliance was placed in the case of Saniako N v Stanley Tanui & 4 others [2021] eKLR.
27. It was submitted that the documents alleged to be the Company's Account statement produced does not bear any stamp of the company, or signature from the company's officials/auditors or date or any proof to show they are actually the Company's account statements as alleged and that the petitioner's account of the terms of the quasi shareholder's agreement and his alleged compliance thereof is filled with inconsistencies and that cannot be relied upon and he is therefore not entitled to the refund of kshs. 5,980,000.
28. On whether a debenture resulted in equity, it was submitted that being that the petitioner has not proved the advancement of kshs 5,980,000 to the company as alleged, consequently no debenture by way of constructive trust or equity can arise.
29. On the counterclaim, it was submitted that the respondents produced as exhibit 1, copies of the petitioner's bank statement showing the deposit of the various monies into his account instead of the company's account and thus the respondents proved misappropriation of funds on a balance of probabilities and the petitioner should be ordered to refund the same.
30. It was finally submitted that costs follows the event and that the respondents have shown that the petitioner has not proved his case on a balance of probability, they are entitled to the cost of the suit and the petitioner's case should be allowed as prayed.



Determination/Analysis

31. I have considered the pleadings and submissions for and against this petition. The issues that arise for determination are whether the petitioner is entitled to the orders sought and to determine the dispute(s), the genesis of this matter is important whereby the petitioner alleged that he injected some capital into the company.
32. It is not in dispute that the Company in this case was a product of business idea by its promoters the petitioner and the respondents sometime in 2017 and it was vide an oral agreement on the issues of financing, shareholding and post incorporation management of the Company.
33. The petitioner was allocated 150,000 shares of the ordinary shares and although the petitioner's proprietary interest was captured in the Company's register, he was never issued with a share certificate.
34. The petitioner averred that there was breach of his statutory and constitutional guaranteed rights through failure to issue him with share certificates is contrary to provisions of Section 496(1)(b) of the Companies Act 2015, failure to formalize his capital investment as a debenture and register it as a security, variation of his number of shares and fraudulent alteration of the member's register by deleting his name, failure by the company officials to call for Annual general meeting, supply the petitioner with annual financial statement and report and failure by the Company officials to formalize the petitioner's quasi-shareholder's agreement.
35. The Respondents on the other hand averred that the petitioner ceased to be a member of the company voluntarily, when he sold all his shares to the incoming director and that the averment that his name was deleted from the register was baseless.
36. The Respondents also averred that the petitioner resigned voluntarily and discharge the Respondents from any claim arising from his employment.
37. The Respondent's raised a counter claim against the petitioner for a sum of Kshs 12,000,000 being an amount paid to his personal bank account and MPESA by various clients for drilling boreholes in Maua Meru County
38. The dispute that clearly arises is whether the petitioner voluntarily transferred his shares or not.
39. There is a letter dated 7th September 2021 that the petitioner allegedly authored and signed acknowledging that he had no claim against the Company for breach of contract, wrongful or unfair dismissal, redundancy, compensation for loss of office or any other claims and a transfer of share form dated 7th September 2021 allegedly signed by the petitioner.
40. The petitioner disputed signing the transfer and alleged that it was a forgery. There is a letter from the Directorate of Criminal Investigation stating that the file for investigation of forgery was forwarded to the Director of Public Prosecution seeking direction and the file was returned with recommendations that the matter be closed with no further police action.
41. There is also a forensic document examination report that concluded that the questioned signature in the transfer of share form was signed by a different author and not the Petitioner.
42. The case of R.G Patel Vs Ialji Makani [1957] E.A 314, which sets out the standard of proof as follows:

“Allegations of fraud must be strictly proved, although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required.”



43. In the case of *AAT Holdings Limited vs Diamond Shields International Ltd* (2014) eKLR where it was held:

“That requirement of the law is fashioned that way because an allegation of forgery is serious and imputes a criminal conduct on the part of the plaintiff; it must, therefore, be pleaded with full particulars and details as to bring to the attention of the plaintiff of the kind of defence his case is faced with. Equally, that information is necessary for purposes of filing subsequent pleadings by the Plaintiff, particularly reply to defence. In the absence of such particularities of the alleged defence, the proposed defence of forgery is a mere sham and is only contrived to pass for a triable issue.”

44. The Court of appeal case of *Zakayo Michubu Kibuange v Lydia Kaguna Japheth & 2 Others* (2014) eKLR where the court held:-

“Forgery is a very serious allegation to make and more so, if it involves one’s signature on a disputed document. One would have expected that having made such serious allegation and accusation, the appellant would have done the right thing and immediately took remedial steps such as reporting the alleged forgery to the relevant authorities for appropriate action or intervention. Instead what does he do? He sits tight and cheekily invites the 1st respondent to prove that his signature was not a forgery by invoking the assistance of document examiners. It is a cardinal principle of law that he who alleges must prove. The appellant having failed to undertake the necessary inquiry as to the forgery or not of his signature, the allegation was merely self-serving and without any basis at all.”

45. The determination of disputes is governed by legal principles and processes outlined in Statutes.

A Company’s legal existence and operations are governed by the *Companies Act* 2015 which provides for formation and registration of Companies Section 11-19 of the Act which outlines that the registration of Memorandum of Association with names of Promoters/ Members/Shareholders/ Directors particulars of full names and addresses and shareholding shall be prepared and filed.

46. The *Companies Act* 2015 Section 20 -26 provides for the Company’s Constitution which provides for the Articles of Association that contains the internal governance, management and/or operations of the Company. Both (Memarts) are filed by Promoters/Shareholders/Directors with the Company’s Registry. The Registrar of companies is the regulator and custodian of all companies’ record and it is mandated to implement the *Companies Act*. The Registrar of Companies will generate the CR-12 with full names office holding and shareholding as at the date of issue.

47. In this case these vital documents were not presented to this Court by witnesses to aid in establishment of the truth and hence delve into dispute resolution.

48. Secondly, Evidence is the means of proving facts. Facts are proved through introduction of evidence and if believed the evidence becomes fact.

Section 3 of the *Evidence Act* defines "evidence" as means by which an alleged matter of fact, the truth of which is submitted to investigation, is proved or disproved; and, without prejudice to the foregoing generality, includes statements by accused persons, admissions, and observation by the court in its judicial capacity of the parties.

49. The quality of evidence is determined by law. The law prescribes through legal principles the types of evidence to be presented; when and how to present evidence. The law prescribes how evidence is evaluated to prove facts in issue for determination by the Court. Therefore, *Evidence Act* Cap 80



provides legal principles on burden and standard of proof and direct and documentary evidence as follows;

Section 63 of the *Evidence Act*;

- (1) oral evidence must in all cases be direct evidence.
- (2) For the purposes of subsection (1) of this section, “direct evidence” means—
 - (a) with reference to a fact which could be seen, the evidence of a witness who says he saw it;
 - (b) with reference to a fact which could be heard, the evidence of a witness who says he heard it;
 - (c) with reference to a fact which could be perceived by any other sense or in any other manner, the evidence of a witness who says he perceived it by that sense or in that manner;
 - (d) with reference to an opinion or to the grounds on which that opinion is held, the evidence of the person who holds that opinion or, as the case maybe, who holds it on those grounds:

In the case of *State v. Baker*, 249 Or. 549, 438 P.2d 978 (1968) in this case it was observed that:

“ Direct evidence includes what is heard as well as what is seen; indeed, what is perceived by the senses. Without looking to defendant’s admissions about riding with his relatives to Portland to sell wire, there was evidence from which the jury could find guilt.”

50. Documentary evidence is prescribed by Section 64 of the Act on primary documents and Section 66 of the Act on Secondary evidence.
51. The burden of proof in civil cases on the balance of probability was defined in the case of *Kanyungu Njogu vs Daniel Kimani Maingi* [2000] eKLR that when the court is faced with two probabilities, it can only decide the case on a balance of probability, if there is evidence to show that one probability was more probable than the other.
52. Burden of Proof is used to mean an obligation to adduce evidence of a fact. According to Phipson on the Law of Evidence, the term ‘burden of proof’ has two distinct meanings:
 1. Obligation on a party to convince the tribunal on a fact; here we are talking of the obligation of a party to persuade a tribunal to come into one’s way of thinking. The persuasion would be to get the tribunal to believe whatever proposition the party is making. That proposition of fact has to be a fact in issue. One that will be critical to the party with the obligation. The penalty that one suffers if they fail to proof their burden of proof is that they will fail, they will not get whatever judgment they require and if the plaintiff they will not sustain a conviction or claim and if defendant no relief. There will be a burden to persuade on each fact and maybe the matter that you failed to persuade on is not critical to the whole matter so you can still win.
 2. The obligation to adduce sufficient evidence of a particular fact. The reason that one seeks to adduce sufficient evidence of a fact is to justify a finding of a particular matter. This is the evidential burden of proof. The person that will have the legal burden of proof will almost always have the burden of adducing evidence.



53. It is trite law that whoever alleges must prove. Section 107 (1) of the *Evidence Act*, Cap 80 Laws of Kenya provides that:

“Burden of proof

- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

68. Sections 109 and 112 of the same Act provides:

109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of the fact shall lie on any particular person.

112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving the fact is upon him

54. At this stage despite allegations by the petitioner that the signatures appearing on the transfer of share form is not his, the standard of proof for forgery has not been attained.

55. On whether the capital contribution can be construed as a debenture in equity or not, the petitioner averred that he invested in the company through an oral agreement. It is my view that the issue of whether the petitioner invested in the company was not in dispute but no written agreement that captures the terms of their agreement at the time of the incorporation of the company was produced nor incorporation of the Company documents as registered with the Registrar of Companies were produced.

56. The issue that arises majorly is whether the petitioner voluntarily transferred his shares or not in which the petitioner claimed that he did not transfer his shares and the letters produced by the respondents was a forgery.

57. The issue of Counterclaim by the Defendants was equally not proved.

58. The Court took time went out of its way to outline legal principles and processes that aid dispute resolution. The Court determines disputes based on evidence adduced either through oral evidence and/or production of documents and all subjected to cross examination to test credibility of the witness and veracity of the evidence. It is the facts derived from evidence that the law is applied in analysis to determine the issue(s)

59. The Court record as the time of writing the intended judgment contains;

- a. The Petitioner’s Petition with Affidavit & bundle of documents
- b. The 1st 2nd 3rd & 4th Respondents Replying Affidavit & Counterclaim
- c. Petitioner’s written Submissions
- d. Respondent’s Written Submissions



As the Court record is parties through Counsel filed pleadings and lists of documentary exhibits but pertinent documents missing from the Court file.

60. The documents filed cannot by and of themselves discharge the burden & standard of proof required in civil cases. The documents cannot tender evidence of authenticity and content without the/a witness referring producing or owning the document as author/maker of the same.
61. The Court record also confirms as follows;
On 14/11/2022- parties through Counsel sought more time to file further pleadings.
On 14/12/2022- parties through Counsel informed this Court that they complied with Pre- Trial Process and took a hearing date.
On 9/2/2023- Parties through Counsel were ready for hearing
62. The Plaintiff filed statement and Defendant relied on affidavits.
63. Counsel sought time to familiarize with outcome of DCI Investigations. Counsel informed Court the hearing was to be adjourned to allow Counsel attend to a personal matter and allow parties to negotiate with a view to settle the matter. 2 witnesses included the Plaintiff & the Document Examiner. There were several mentions culminating with the Consent by parties through respective advocates that the matter be determined by written submissions. However, upon reflection and perusal of the court record, I find the judgment premature in the absence of evidence through viva voce hearing. I cannot in good conscience engage in judgment writing in the absence of evidence which from the record parties/Counsel were prepared to adduce in Court.
64. I am fortified by the Overriding objective espoused by 1A IB & 3A of CPA.
 1. The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.

Disposition

1. The Parties through respective Counsel to conform and/or undergo Pre-Trial process before DR MHC within 30 days of this judgment.
2. The parties through respective Counsel to take hearing date within next 30 days after Pre-Trial.

RULING DELIVERED, DATED AND SIGNED IN OPEN COURT AT MACHAKOS THIS 26TH DAY OF APRIL, 2024 (VIRTUAL/PHYSICAL CONFERENCE).

M. W. MUIGAI

JUDGE

