REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

MISC. CIVIL APPLICATION NO. 142 OF 2020

MAY SUSAN SPINKS.....1ST PLAINTIFF/APPLICANT

EAST AFRICAN MISSION FOR

SCHOOL & ORPHANAGE LIMITED.....2ND PLAINTIFF/APPLICANT

-VERSUS-

RALPH GRAEME SPINKS.....1ST RESPONDENT

GARY FRANCIS MARTIN.....2ND RESPONDENT

AND

BEN ZEBULAN SPINKS.....1ST INTERESTED PARTY

DANIELLE MAY SPINKS.....2ND INTERESTED PARTY

RULING

1. The 2nd Applicant (hereinafter, "the Company") is a limited liability Company limited by guarantee and with no share capital. Its main object, it would seem, is to set up and run orphanages for destitute children and to raise funding for purposes connected therewith.

2. The Company was incorporated by the 1st Applicant; the 1st Respondent; and the 2nd Respondent. All three are Australian nationals. The 1st Applicant and the 1st Respondent were married at the time they incorporated the Company. They ran the Company together until sometime in June, 2019 when they divorced. The 1st Applicant claims that all along she was excluded from the running of the Company but that the pattern worsened after the divorce.

3. The 1st Applicant fears that the Respondents are running the Company against its objects and purposes and that they are misappropriating its finances and wasting the Company assets. She claims that, in particular, the 1st Applicant is running the Company for "his sole benefit and that of his friends and/or allies."

4. In the three most consequential paragraphs in her Proposed Plaint, the 1st Applicant states:

> *16. Despite the 1st Plaintiff's demands for openness and accountability with regard to the affairs of the [Company[, the 1st Defendant has totally refused to hand over information regarding the 2nd Plaintiff's financial records, bank statements, financial position, major decisions as well as the company's projects and assets. Further, the 1st Plaintiff is apprehensive that over the past 5 years alone, the 1st Defendant has occasioned the [Company] losses to the tune of over 40,000AUSD.*
>
> *17. Therefore, the 1st Plaintiff, on behalf of the 2nd Plaintiff Company seeks redress against the 1st and 2nd Defendants jointly and severally for the breaches of duty, breach of care, conversion, theft, misappropriation and abuse of office by the Defendants and further seeks restitution of all the monies taken from the [Company] by the Defendants and the recovery of all the assets and properties bought and/or acquired by the Defendants using monies belonging to the [Company] by the Defendants without lawful authority.*
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> *19. Further….the Plaintiffs aver that since the [divorce], the 1 st Defendant has been using unorthodox means geared towards*

removing the 1st Plaintiff [and her two children named in the suit as Interested Parties] as directors of the [Company]. On numerous occasions, the 1st Defendant has threatened and coerced the [children] into signing resignation letters indicating that they are resigning as directors of the [Company].

5. The Proposed Plaint, brought partly in a derivative capacity, seeks a whopping 18 reliefs. The first four seek the restraining of the Respondents from removing the 1st Applicant and her children as directors. The next eight reliefs seek to protect the Company's accounts and finances from alleged waste by the Respondents. The remaining substantive reliefs seek the appointment of an interim team to run the Company and barring the Respondents from running the Company as directors.

6. The two Applicants began the suit by way of a Notice of Motion dated 04/08/2020. Again, that Motion has a whopping 17 prayers. The second prayer seeks leave of the Court for the 1st Applicant to "institute this derivative suit, against the 1st and 2nd Defendants/Respondents on behalf of the [Company] and for the avoidance of doubt, the said leave to operate as authority to the 1st Plaintiff to institute and prosecute the derivative suit herein."

7. The Notice of Motion also seeks certain other interlocutory reliefs including orders of injunction against the Respondents restraining them from convening meetings of the Company with the purpose of removing the 1st Applicant or her children as directors as well as restraining the Respondents from withdrawing funds from the Company's various accounts or otherwise dealing with its corporate assets.

8. The Application was certified urgent and some interim orders granted.

9. When the matter first came before me, on noting the nature of the controversy, I encouraged the parties to attempt an amicable out of court resolution through mediation. After several months, the parties reported that no agreement had been reached. This ripened the Application for judicial disposal. The parties filed written submissions to go with the Affidavits filed by each party. In addition, Counsel for the Respondents filed a hybrid "Preliminary Objection/Grounds of Opposition".

10. The Respondents raised two Preliminary Objections:

a. *First*, that the Application is bad in law because the internal mechanisms of Dispute Resolution were not exhausted as contemplated by Clause 60 of the Articles and Memorandum of Association of the Company.

b. *Second*, that the Application was bad in law because there was no resolution authorizing the Company to bring the suit.

11. Due to their potential to dispose of the case, I directed the parties to argue the Preliminary points in limine. I have reversed the order in which the points were raised for analysis purposes.

12. The Respondents say that the suit must be summarily dismissed because the Plaintiffs have not been able to demonstrate that the Company gave a written authorization to bring the suit. The Respondents have primarily cited ***Bugerere Coffee Growers Ltd v Sebaduka & Another (1970) EA 147*** and ***East African Portland Cement Ltd v The Capital Markets Authority & 5 Others [2013] eKLR*** for the proposition that "when companies authorise the commencement of legal proceedings, a resolution or resolutions have to be passed either at a company or Board of Directors` meeting and recorded in the minutes" and that failure to evidence such resolutions is fatal for the maintenance of a suit.

13. This objection by the Respondents is eminently misplaced. As pointed out above, the first prayer the Applicants have sought in this Court is for leave to bring the suit as a derivative suit. This is a suit fashioned under section 241 of the Companies Act. That section allows a party

14. Section 239 of the Companies Act provides:

(1.) In order to continue a derivative claim brought under this Part by a member, the member has to apply to the Court for permission to continue it.

(2.) If satisfied that the application and the evidence adduced by the applicant in support of it do not disclose a case for giving permission, the Court –

a. Shall dismiss the application; and

b. May make any consequential order it considers appropriate.

15. This section, in plain language, permits a shareholder to bring, without the permission of the corporation, a suit on its behalf. A shareholder derivative suit is one brought by a shareholder on behalf of a corporation when the shareholder forms the opinion that the corporation has a valid cause of action, but has refused to pursue it. Often, the corporation would have refused to act because the aggrieving party is close to the corporation – like a director or a corporate officer.

16. In the instant case, the 1st Applicant is explicit that she seeks to bring the action on both her behalf as well as on behalf of the Company. Indeed, rather than commence the action outright by way of Plaint, the suit is commenced by way of Notice of Motion to seek the leave of the Court under section 239 of the Companies Act. In the circumstances, the argument that the 1st Applicant required the Company's resolution to commence the suit is plainly absurd and unavailing.

17. I will now turn to the more substantial objection to the suit. The Respondents argue that the suit is bad in law because the Applicants have not exhausted the internal dispute resolution mechanism stipulated in Clause 60 of the Company's Memorandum and Articles of Association. That clause, they argue, creates an internal dispute mechanism which must be used as a first port of call before any party approaches the Court.

18. The Respondents further argue that, in the circumstances, the Court is bereft of jurisdiction and it must refer the matter for arbitration. This is because, they argue, Clause 60 prohibits the 1st Applicant from "sidestepping the stipulated internal dispute resolution mechanism, which, in any case, provides a procedurally fair process for the resolution of disputes arising between the [Company] and its members, or between its members."

19. The Respondents have relied on a number of decided cases which establish the point that a party is required, under our jurisprudence, to exhaust local remedies before approaching the Court. The cases cited include: ***Speaker of National Assembly v Karume [1992] KLR 21; Geoffrey Muthinja Kabiru & 2 Others – Vs – Samuel Munga Henry & 1756 Others [2015] eKLR; David Nyakengo Nyakwama & Another v Kenya Tea Development Agency Ltd & 2 Others [2020] eKLR; Job Fellis Ndarera & Another v Nyamache Tea Factory Company Ltd & 2 Others [2016] eKLR.***

20. The Applicants have resisted the applicability of the arbitration clause on two related grounds. First, they argue that the suit is brought as a derivative lawsuit and that, therefore, only the High Court has jurisdiction to hear and determine it. The Applicants argue that leave to commence or continue a derivative suit or claim can only be granted by the High Court and any other institution. They therefore urge the Court to make a finding that derivative suits can only be brought in the High Court.

21. Second, the Applicants argue that the Applicant seeks injunctive reliefs in at least six of its prayers. They further argue that pursuant to section 7 of the Arbitration Act, only the High Court has jurisdiction to grant injunctive reliefs such as the ones sought in the present Application. They rely on the decision in ***World Duty Free Company Limited v Kenya Airports Authority [2012] eKLR***. The Applicants have also cited: ***Wilson Kipkemboi Kipkoti & Another v Samuel Kiptala Chemilil & 4 Others [2019] eKLR*** and ***Tash Goel Vedprakash v Moses Wambua Mutua & Another [2014] eKLR***.

22. The starting point for the analysis is to reiterate the position of our jurisprudence that where there exists alternative or "local" forms of dispute resolution either in a statute, policy or privately contracted, our Courts require that a disputant exhaust that mechanism before approaching Court. As the Courts have variously explained, this is a doctrine of vintage ancestry and predates the Constitution of Kenya, 2010 which, at Article 159(2)(c) constitutionalizes the judicial doctrine.

23. The doctrine found its most famous enunciation pre-2010 in the Court of Appeal's decision in ***Speaker of National Assembly v Karume [1992] KLR 21*** in the following oft-repeated words:

> *Where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures*.

24. It found its most memorable justification post-2010 in the Court of Appeal's judgment in ***Geoffrey Muthinja Kabiru & 2 Others – Vs – Samuel Munga Henry & 1756 Others [2015] eKLR***, where the Court that:

> *It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews…. The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the courts. The Ex Parte Applicants argue that this accords with Article 159 of the Constitution which commands Courts to encourage alternative means of dispute resolution*.

25. Many decisions of the High Court and the Court of Appeal – including the two cited by the Respondents – are to the same effect. They include: ***Mutanga Tea & Coffee Company Ltd v Shikara Limited & Another [2015] eKLR***; ***Mohammed Badi & Others v Attorney General & Others [2018 eKLR; R vs Chief Registrar of the Judiciary & Others ex parte Riley Services; R v Public Procurement Administrative Review Board & Another Ex Parte Avante International Technology Inc. [2013] eKLR; R v National Housing Corporation Ex Parte Ernie Campbell & Company [2016] eKLR.***

26. In the present case, there is no dispute between the parties that there is an arbitration clause in the Company's Memorandum and Articles of Association. Clause 60 reads as follows:

> *Whenever any difference arises between the organisation on the one hand and any of the members, their executors, administrators or assigns on the other hand, touching the true intent or construction or the incidents, or consequences of these Articles, or of the statutes, or touching anything then or thereafter done, executed, omitted, or suffered in pursuance of these Articles or any claim on account of any such breach or alleged breach or otherwise relating to the premises, or to these Articles or to any statues affecting the organisation, or to any of the affairs of the organisation, every such difference shall be referred to the decision of an arbitrator, to be appointed by the parties in difference, or if they cannot agree upon a single arbitrator to the decision of the two arbitrators, of whom one shall be appointed by each of the parties in difference.*

27. Section 6 of the Arbitration Act, 1995 provides as follows:

6(1) A Court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than the time when that party enters appearance or otherwise acknowledges the claim against which the stay of proceedings is sought, stay the proceedings and refer to the parties to arbitration unless it finds:

(a) That the arbitration agreement is null and void, inoperative or incapable of being performed; or

(b) That there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration.

28. This section, read together with Article 159(2)(c) of the Constitution and our decisional law cited above provide a strong basis and textual foundation for respecting arbitration clauses in parties' contracts. In this case, all the parties agree that Clause 60 of Articles and Memorandum of Association contains an arbitration clause. It therefore follows that the 1st Applicant is not permitted, under the terms of Clause 60 and our law, to commence an action in Court unless she brings herself within two exceptions:

a. Where she could demonstrate that the arbitration agreement is null and void, inoperative or otherwise incapable of being performed. This would be the case, for example, where there are grounds for rescinding the arbitration agreement *qua* contract.

b. Where she could demonstrate that the subject matter of the controversy is not covered by the arbitration agreement. Stated differently, parties to an arbitration agreement are not required to go to arbitration when the specific subject matter of the controversy is non-arbitrable.

29. In the present case, the 1st Applicant claims that the arbitration agreement does not apply, first, because part of the action is a derivative suit brought on behalf of the Company. Second, the 1st Applicant claims that the arbitration agreement is inapplicable because the suit seeks injunctive relief which an arbitrator would be unable to grant.

30. It is important to note that the fact that a suit is brought in a derivative capacity does not automatically mean that the shareholder bringing it has to sidestep an otherwise binding arbitration argument. Differently put, a mandatory arbitration agreement in a corporate setting can compel derivative actions to be brought through arbitration. The interesting legal question Counsel for the Applicants posits is whether such an action brought through an arbitration but on behalf of the Company would require Court's imprimatur in the form of the leave contemplated in Section 239 of the Companies Act. There are two possibilities. The first one is that such a "claim" does not come within the meaning of "claim" as that word is used in Section 239 of the Companies Act; that "claim" in that section refers to actions brought to Court. If one takes this position, then, no leave of the Court would be needed to commence arbitration proceedings on behalf of a corporation.

31. The second possibility is that commencing arbitration proceedings comes within the definition of "claim" as that word is used in section 239 of the Companies Act. In that case, a person who desires to commence an action in a derivative capacity but is bound by a mandatory arbitration agreement in the Corporation's bylaws, would have to take a preliminary step to first obtain leave from the Court and then stay the proceedings in order to pursue arbitration.

32. I have not had the benefit of counsel's arguments on this question (of which of these two possibilities applies in Kenya); and I need not reach the question for the determination of the matter before me. It suffices here to say that a mandatory arbitration clause is applicable to derivative lawsuits unless it can be demonstrated in the given case that it should not be covered by the mandatory arbitration clause. In other words, a derivative lawsuit is not *per se* a bar to arbitration proceedings; one can bring a claim on behalf of the corporation in arbitration proceedings.

33. What about the fact that the Applicants are also seeking injunctive relief? Again, the general rule is that the fact that a party is seeking injunctive relief to preserve the rights of the disputants pending the resolution of the dispute or to prevent alleged waste of corporate assets is not an automatic licence to a party to sidestep a mandatory arbitration clause. The position of the law is that the Court may grant injunctive relief at the interlocutory stage so as to preserve the rights of the parties while directing the parties to proceed for arbitration.

34. Under our law, there is a temporal exception to the exclusivity of arbitration for situations that require immediate relief (i.e. injunctive relief to prevent irreparable harm) even if the mandatory arbitration clause requires that all issues be resolved by arbitration. The injunctive relief, however, is only used to preserve the status quo pending the arbitration of the parties' dispute to ensure that the parties' conduct does not render the process a mere formality.

35. Hence, section 7 of the Arbitration Act provides that: *Interim measures by court*

(1) It is not incompatible with an arbitration agreement for a party to request from the High Court, before or during arbitral proceedings, an interim measure of protection and for the High Court to grant that measure.

(2) Where a party applies to the High Court for an injunction or other interim order and the arbitral tribunal has already ruled on any matter relevant to the application, the High Court shall treat the ruling or any finding of fact made in the course of the ruling as conclusive for the purposes of the application.

36. In the present case, I have carefully looked at the allegations and counter-allegations raised by the duelling parties. There is no question that there is a serious fracture in the Company. There is no question that the emotional baggage from the past marriage of the 1st Applicant and the 1st Respondent has played a significant role in deepening the crisis. While this Court is no position to make any findings on the allegations and counter-allegations in the duelling affidavits, the Court can make a finding that there appear to be bona fide issues that need to be ventilated on behalf of both the 1st and 2nd Applicants. The allegations made are particularized and there is no basis for making any finding that the claims have been brought in bad faith as alleged by the Respondents.

37. It would also be fair to observe that the toxic dynamics in the Company are likely to drive corporate decisions being made while the dispute rages. It, therefore, seems only reasonable that as far as possible *status quo* should be maintained as the disputes between the parties are resolved so that the toxicity can be cured.

38. The upshot is the following:

a. The Plaintiffs/Applicants were entitled to approach the Court with the present suit absent the Company's resolutions because part of the claim is a derivative action against the co-directors.

b. From the facts disclosed in the Application, the Court hereby grants leave to the 1st Applicant to commence action against the two Respondents on behalf of the Company.

c. The mandatory arbitration agreement in Clause 60 of the Articles and Memorandum of Association of the Company applies to the present dispute. As such, the present suit can only be continued in arbitration proceedings to be commenced under Clause 60 of the Articles and Memorandum of Association of the Company.

d. From the facts disclosed to the Court in the various affidavits and documents filed in Court, the Court finds that:

i. There are *bona fide* serious issues to be determined in the arbitration proceedings;

ii. That the issues to be so determined may dissipate to the prejudice of the 1st Applicant if *status quo* is not preserved; and

iii. That, therefore, it is necessary to issue an order that *status quo* be maintained respecting corporate affairs of the Company until the arbitration to be commenced is heard and determined. In particular, this order for preservation of *status quo* will mean that no change in directors or corporate officers of the Company will be permitted pending the conclusion of the case.

e. All further proceedings herein are stayed and are referred to arbitration in terms of Clause 60 of the Memorandum and Articles of Association of the Company.

f. In the spirit of amicable settlement of disputes in good faith whose ethos is clearly espoused in Clause 60 of the Memorandum and Articles of Association of the Company, and careful not to penalize a party simply for seeking legal redress in Court where it has not been shown that the party was acting in bad faith, I will, at this point, use the Court's discretion to rule that each party will bear its own costs on this Application.

39. Orders accordingly.

DATED AND DELIVERED AT NAKURU THIS 27TH DAY OF MAY, 2021.

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JOEL NGUGI

JUDGE

NOTE: This judgment was delivered by video-conference pursuant to various Practice Directives by the Honourable Chief Justice authorizing the appropriate use of technology to conduct proceedings and deliver judgments in response to the COVID-19 Pandemic.