



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

MISC. APPLN NO. E.445 OF 2021 (OS)

IN THE MATTER OF SAVANNAH CEMENT LIMITED

AND

**IN THE MATTER OF AN ORDER ALLOWING THE CONVENING OF AN EXTRAORDINARY GENERAL MEETING
UNDER SECTION 280 OF THE COMPANIES ACT, 2015**

SERUJI LIMITED.....APPLICANT

VERSUS

SAVANNAH CEMENT LIMITED.....RESPONDENT

AND

SAVANNAH HEIGHTS LTD.....PROPOSED INTERESTED PARTY

R U L I N G

1. On 10/6/2021, the applicant lodged an application in this Court for leave to be granted to the respondent to hold an Extra Ordinary General Meeting within 7 days of the order. The application was certified urgent and was ordered served for directions on 17/6/2021.
2. On 17/6/2021, the Court directed that the application be once again served for oral hearing on 21/6/2021. According to the CR12 annexed to the application, there were only 2 shareholders of the respondent, **Savannah Heights Ltd and Seruji Ltd.**
3. On 21/6/2021 when the matter came up for hearing, **Mr. Ochieng**, Learned Counsel for the applicant informed the Court that the application had been served and there was an affidavit of service on record. The Court confirmed that there was an affidavit on record dated 18/6/2021 which however showed that the respondent had been duly served. Accordingly, the Court granted the leave sought in the application.
4. Vide an application dated 22/6/2021, the proposed interested party applied to be joined in these proceedings and for injunctive orders to restrain the holding of the said Extra-Ordinary General Meeting. It also sought to restrain the implementation of any resolutions made at the said meeting. There was also a prayer for the review of the order made on 21/6/2021.
5. The grounds upon which the application was made were set out in the body of the Motion and the supporting affidavit of **Donald Kiboro Mwaura** sworn on 22/6/2021. They were basically that; the proposed interested party was a 40% shareholder in the respondent, the applicant's shareholding in the respondent was disputed and that the applicant was therefore not entitled to bring the application under **section 280 of the Companies Act** as it was not a bona fide shareholder of the respondent.
6. It was further contended that the issue of the applicant's shareholding was contested and was pending in **HCCC No. 170 of 2016 Savannah Heights Ltd v. Savannah Cement Ltd & 3 Others**. That the interested party should be given a hearing on the orders made as it was not aware of these proceedings until after the orders were made.
7. The Motion was opposed by the applicant vide a Notice of Preliminary Objection dated 23/6/2021 and a replying affidavit of **Benson Sande Ndeta** sworn on 23/6/2021. The preliminary objection was to the effect that; there was pending another similar application dated 12/5/2016 raising similar issues in **HCCC No. 170 of 2016**, the matter was therefore res judicata and sub-judice.
8. It was also contended that the proposed interested party had not given any authority to the filing of the application as there had been no

meeting of directors to authorize the same. That the firm of Kisilu, Wandati and Company Advocates was conflicted as Mr. Amos Kisilu, advocate a partner in the said Law Firm had been sitting in meetings of the applicant, the respondent and the proposed interested party and there was therefore a conflict of interest in his firm acting for the proposed interested party in this matter.

9. The Court ordered that the Motion be heard together with the preliminary objection. The Court proposes to determine the preliminary objection first before delving into the Motion. The Court has carefully considered the affidavits and the submissions on record.

10. The objection dated 23/6/2021 was two-fold; that the Motion dated 22/6/2021 was sub-judice and res judicata because there was an ongoing case, **Milimani HCC No 170 of 2016** whose subject matter was similar to the one raised in the application.

11. The other grounds, which really cannot be said to constitute a preliminary objection were, that there was a conflict of interest because one of the partners in the firm of Kisilu Wandati & Co Advocates, had been privy to critical information regarding the applicant's case.

12. In **Mukisa Biscuits Manufacturing Co. Ltd vs. West End Distributors Ltd (1969) EA 696**, a preliminary objection was defined as being in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.

13. A Preliminary Objection therefore is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any facts have to be ascertained or the facts are in dispute or if the court is called upon to exercise judicial discretion.

14. In **Oraro vs Mbaja (2005) 1KLR 141**, the Court held: -

“Anything that purports to be a Preliminary Objection must not deal with disputed facts and it must not derive its foundation from factual information which stands to be tested by rules of evidence”.

15. The present objection was on the basis that the matter is sub-judice or res judicata. The matter cannot be res-judicata because, it is common ground that the application dated 12/5/2016 in **Milimani HCCC No. 170 of 2016** is still pending. It has not been determined yet.

16. On sub-judice, this is codified under **section 6 of the Civil Procedure Act** which provides: -

“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.”

17. In **Republic v Paul Kihara Kariuki, Attorney General & 2 others Ex parte Law Society of Kenya [2020] Eklr**, the court stated: -

“Both suits challenge the same decision. The prayers sought in both suits are the same. Since both the suits cite similar issues, the decision of the first suit should be binding on those issues and it need not be tried again. If the plea in the first suit succeeds, then it will render the second case res judicata. In fact, a favourable decision would not only benefit the Nairobi Branch, but the entire bar in the country. This truth renders the second suit useless and of no utilitarian value. ... Thus, it is desirable that such issues be resolved or adjudicated by one court only. It will avoid conflicting decisions or complications arising therefrom”.

18. In this regard, the rule is to the effect that, where an issue is pending in a court of law for adjudication between the same parties, any other court is barred from trying that issue so long as the first suit remains undetermined. The purpose of the rule is to pin-down parties to one litigation and avoid the possibility of contradictory verdicts by two courts in respect of the same relief. It also seeks to prevent multiplicity of proceedings.

19. The main ground of the objection is that, the proposed interested party filed a similar application dated 12/5/2016 in **HCCC No. 170 of 2016** which is still pending. I have seen the application. Amongst the orders sought is an order that I wish to reproduce. It states;

“That this Honorable court be pleased to issue temporary injunction stopping the 1st defendant, its directors and or its shareholders from holding the Extraordinary General Meeting scheduled to take place on Saturday 14th May 2016 at Savannah Cement Limited premises or at any other place whatsoever, or any other shareholders meeting pending the conclusion of the investigations currently being under the Criminal Investigation Department, and the resolution of shareholder dispute between the 1st plaintiff and the 3rd and 4th defendant as to whether the 2nd defendant is a shareholder of the 1st defendant being referred to and determined through arbitration”.

20. In the present application, prayer nos. 3 and 4 seek similar reliefs. To restrain the respondent, its shareholders and/or directors from holding the Extra Ordinary General meeting or any other General Meeting pending the resolution of the shareholders' dispute in **HCCC No. 170 of 2016**.

21. On the face of it, it is clear that the application dated 12/5/2016 in **HCCC No. 170 of 2016, Savannah Heights Limited vs Savannah Cement Limited & 3 Others** and prayer nos. 3 and 4 in the present application are substantially similar. Although some of the reliefs in the present application are not in the previous application, the Court cannot deal with prayers nos. 3 and 4 without alluding to the shareholders' dispute that is pending in **HCCC No. 170 of 2016**.

22. The parties in the previous and the present application are the same. It is illogical that an application filed in May, 2016 has to-date not been prosecuted. In my view, the issue of whether or not a General Meeting should be held in light of the shareholding dispute, is at the heart of the application that is pending in **HCCC No. 170 of 2016**. This Court cannot purport to pronounce itself on that on the basis of the shareholder issue in respect thereof.

23. It was contended by the interested party that the application dated 12/5/2021 was for General Meetings for dates now past. However, the reading of the prayers in that application, as in the present application, are directed at the meetings intended for specific dates "*or any other general meeting of the respondent*". The latter part of the prayer includes future or other meetings than the specific ones cited.

24. The prayers in the application of 12/5/2021 as well as prayer nos. 3 and 4 in the present application are anchored on the dispute of the applicant's shareholding in the respondent. Allowing the said prayers in the present application would open up an avenue for this court to determine the shareholding dispute whilst it is still live before another competent court in **HCCC No. 170 of 2016, Savannah Heights Limited vs Savannah Cement Limited & 3 Others**.

25. Accordingly, the Court finds merit in the applicant's preliminary objection in respect of prayer nos. 3 and 4 of the application and strikes out them accordingly.

26. That leaves prayer nos. 2, 5 and 6 of the application. These sought that the interested party be enjoined in these proceedings, the restraining of the implementation of the resolutions made pursuant to the orders of 21/6/2021 and the review of the said order.

27. It is not in dispute that the interested party is a 40% shareholder in the respondent. It is also not disputed that the interested party was not served with the Originating Summons. That application was heard ex-parte. Surely the interested party was entitled to be heard in that application.

28. As for the orders made on 21/6/2021, they cannot stand. To the extent that they were made ex-parte, they are set aside. In this regard, the application dated 22/6/2021 partially succeeds and the court makes the following orders: -

- a. Prayer nos. 3 and 4 are sub-judice the application dated 12/5/2021 in **HCCC No. 170 of 2016** and are therefore struck out.
- b. The proposed interested party is hereby enjoined in these proceedings as an interested party.
- c. The orders made herein on 21/6/2021 be and are hereby set aside in their entirety.
- d. The application dated 10/6/2021 is to be heard as shall be directed at the delivery of this ruling.
- e. Since the application was only partially successful, each party is to shoulder own costs.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 13TH DAY OF AUGUST, 2021.

A. MABEYA, FCI Arb

JUDGE