



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI COMMERCIAL & TAX DIVISION**

**HCCC NO. 130 OF 2018**

**SIMON MBURU NDUNG’U .....1<sup>ST</sup> PLAINTIFF**

**MARY WANJUNU MBUGUA.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**SAMUEL KAGO KANYI.....1<sup>ST</sup> DEFENDANT**

**MARY WANJIRU MUIRURI.....2<sup>ND</sup> DEFENDANT**

**REGISTRAR OF COMPANIES.....3<sup>RD</sup> DEFENDANT**

**RULING**

**PRELIMINARY OBJECTION**

**THE PLAINTIFF’S CASE**

Aggrieved by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants’ actions to oust a director by illegal allotment of shares among other unlawful acts, the Plaintiffs filed the Plaint seeking the following Orders:

a) A declaration that the acts, conducts and/ or activities hitherto executed and/ or performed by the Respondents on behalf of **Expreso Limited** (‘the Company’) be declared null and void and the same reversed.

b) An order directing the 3<sup>rd</sup> Defendant (the Registrar of Companies) to rectify the Company Register of Expreso Limited by deleting the irregularly, fraudulent particulars of directors and shareholding of the Company and that the Register reflect the following as the shareholding and directorship of the Company:

a) Shareholding

Samuel Kago Kanyi..... 400 Shares

Mary Wanjiku Muiruri..... 400 Shares

Simon Mburu Ndung’u..... 800 Shares

Mary Wanjunu Mbugua.....800 Shares

**Total Allotted Shares to be 2,400.**

**Unallotted shares to remain 7,600.**

b) Directorship

Samuel Kago Kanyi.....Director

Mary Wanjiku Muiruri.....Director

Simon Mburu Ndung'u.....Director

Mary Wanjunu Mbugua.....Director

c) Costs and any other Relief the Court would deem fit.

The Plaintiff's case was supported by evidence of the 1<sup>st</sup> Plaintiff by way of a sworn affidavit. He stated that Expreso Limited was incorporated on 2<sup>nd</sup> December, 2015 and it had the 1<sup>st</sup> Defendant (Kago) and the 2<sup>nd</sup> Defendant (Wanjiku) as the sole Directors/Shareholders at the time of incorporation. Each of them held 400 ordinary shares. The company's nominal capital at inception was **Kshs 100,000** divided into 1000 ordinary shares.

Subsequent to that allotment, the company passed a special resolution on 16<sup>th</sup> December 2015 to add two more directors/shareholders by appointment. Additionally, the company resolved to increase its nominal capital to Kshs. 1,000,000 divided into 10,000 ordinary shares of Kshs. 100 each. The two new directors, Simon Mburu and Mary Wanjunu were each allotted 800 shares and no subsequent meeting was ever held to allot the remaining shares.

On 22<sup>nd</sup> March, 2018, an official search of the company and its **CR12** Form indicated that its directors were Samuel Kago, Simon Mburu, Mary Wanjunu and Mary Wanjiku with 400, 800, 800 and 400 shares respectively.

A further search on the **CR12** Form of 6<sup>th</sup> May, 2019 indicated that Mary Wanjunu Mbugua had been ousted as a director. Hitherto, the directors were Kago (6400 shares), Mburu (3200 shares) and Wanjiku (400 shares). The effect of this is that both Kago and Mburu ended up with a larger allocation of shares than they had in the Company.

The Plaintiffs deponed that failure to convene Board of Director's Meeting or shareholder's meeting to allot the new shares amounted to fraud and a forgery of documents. Further, Mary Wanjiru had neither resigned nor been ousted as a Director. Thus, the 3<sup>rd</sup> Respondent's action of registering these unauthorized changes also amounted to fraud and forgery of documents.

In particular, the Plaintiffs deponed that, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants committed fraud and illegality by:

- a) Transferring the shares using forged, fake, counterfeit and phoney documents.
- b) Making documents without authority and/or validity.
- c) Conspiring with 3<sup>rd</sup> parties to remove a director Mary Manjiru and allot more shares to themselves.
- d) Presenting and/or uttering false and/or forged documents to the 3<sup>rd</sup> Defendant.
- e) Failing to observe, obey, adhere to and abide by the law and in particular the Company's Constitution and Companies Act.
- f) Acting with impunity and in total disregard of validity and sanctity of ownership of shares of the Company.
- g) Abusing their office to the detriment and prejudice of the Plaintiffs.
- h) Disregarding and abusing the Plaintiffs constitutionally protected rights to own shares of the Company.

The plaintiffs further deponed that they had not been provided with information as to how these changes in shareholding and removal of Director had been effected despite demanding this information from the 1<sup>st</sup> and 2<sup>nd</sup> Defendants to date.

### **PRELIMINARY OBJECTION**

The Defendants raised a Preliminary Objection to the Plaintiffs' suit brought to court filed on 4<sup>th</sup> June, 2019 vide the Notice of Motion application dated 8<sup>th</sup> July 2019.

The Defendants' Preliminary Objection was premised on lack of jurisdiction of the Court to hear and determine the dispute as the dispute in question ought to be referred to Arbitration in line with the Company's **Clause 40 of its Articles of Association**.

In the application, the Defendant/Applicants sought a stay of proceedings between the parties in court and sought that the dispute be referred to arbitration and costs awarded to the Defendant/Applicants.

### **THE PLAINTIFF/ RESPONDENTS REPLY**

The Plaintiff/Respondents opposed the Defendants' Notice of Preliminary objection to the underlying suit by the Replying affidavit of the 1<sup>st</sup>

plaintiff dated 16<sup>th</sup> July, 2019. The Plaintiff/Respondents deponed that the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs together with the 1<sup>st</sup> and 2<sup>nd</sup> Defendants were all shareholders and directors of the company.

The Plaintiff/Respondent argued that the suit upon which the P.O was sought was based on a dispute between members and not between the company on one hand and members on the other hand as referred to in the company's Memorandum and Articles of Association.

Further, the Plaintiff/Respondents deponed that any interpretation of the Company's Constitution and to investigate the true intention of the parties, would be heard by the Court. Thus, the only disputes that ought to be referred for arbitration are the ones pitting the company on one hand and the members on the other hand as per the Arbitration Agreement/Clause. In the affidavit, the Respondents deponed that the court had jurisdiction to hear and determine the matter since it was a dispute between the company members with regard to shareholding and not the members *vis a vis* the company.

According to the Plaintiff/Respondents, the matter involved illegal transfer of shares which matter ought to be determined in court.

### **3<sup>RD</sup> DEFENDANTS SUBMISSION**

The 3<sup>rd</sup> Defendant submitted that the dispute arose from the Espresso Company, incorporated under the Companies Act; where the parties were/directors/shareholders/members and there are allegations that the Plaintiff was unlawfully ousted from the Company.

In *Abdirahman Affi Abdalla vs Osupuko Service Station Ltd & Anor(2012)* referred to *Hickman vs Kent Romney March Sheep Breeders Association Ltd [1915] 1 Ch 881* as follows;

***“The principle ordains that a Company's Articles of Association give rise to a contract not only between every member and the Company, but also among members interse. The logical conclusion to be drawn from that principle is that members of the 1<sup>st</sup> plaintiff Company are bound by the Company's Articles among themselves and therefore Article 31 becomes an Arbitrating Agreement among all members.”***

### **DETERMINATION**

From the pleadings filed by both parties and submissions the following are the issues to be determined by the Court: -

#### **1. Whether this court has Jurisdiction to deal with the dispute in question.**

The question of jurisdiction was well settled in the case *Samuel Kamau Macharia v. Kenya Commercial Bank Ltd & 2 others (2012) eKLR* as well as in *Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd (1989) KLR 1*, where Nyarangi J. of the Court of Appeal held that:

***“Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”***

***On the issue of whether this Court should stay the underlying suit (“the proceedings”) dated 4<sup>th</sup> June, 2019 and refer the dispute to Arbitration for hearing and determination; the Court observed;***

The power of a court to stay proceedings and refer matters to arbitration is provided for under **Section 6 of the Arbitration Act Cap 4 of 1995**. It states that:

***“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 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.***

Additionally, in *Martha Nyambura Wagiciengo v. Samuel Warugu Kimotho & 3 others (HC case No. 208 of 2018)*, Justice J. Kamau stated that:

***“...the issues raised in the Plaintiff's suit fall within the ambits of Clause 3 of the Memorandum of Association of the 3<sup>rd</sup> Respondent. That this suit is premature and as such, the prudent way to go is to stay the proceedings herein and refer the parties to arbitration. I have therefore downed the tools for want of jurisdiction as far as this court is concerned on the matters, other than staying the proceedings and refer the parties to arbitration.”***

In the instant case; the Arbitration Agreement clause is: **Clause 40 of the Articles of Association** which provides;

***“All differences arising between the Company on the one hand and any of the members, their executors, administrators, or assignees on the other hand or, touching on the true intent or construction, or incidents, or consequences of these Articles, or of the statutes, or touching on anything then and 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 of the affairs of the Company, every difference shall be referred to the decision of an Arbitrator.....”***

The import of the **clause 40** is that all disputes relating to the **Articles of Association** shall be arbitrated.

The Plaintiffs claim mainly consists of illegal and/or irregular allotment of shares of the Company.

It is further alleged that one of the Directors was/is irregularly and unlawfully removed from the Company.

By virtue of **Section 6 of Arbitration Act 1995**, the Defendant entered appearance and filed an application to stay proceedings so as to refer the dispute for arbitration. The Defendant did not file Defense so as to waive the right to enforce the Arbitration Agreement/Clause and instead submit to the jurisdiction of the Court to hear and it determine the dispute. The dispute is the ouster of a director of the Company illegally /irregularly contrary to the **Companies Act 2015** and **Memorandum and Articles of Association** of the Company. **Clause 40** of the Articles of the Company was/is not challenged as invalid and outlines in detail the parties’ choice of forum for dispute resolution. For these reasons I find that this Court lacks jurisdiction to hear and determine the dispute.

The proceedings herein are stayed and the dispute is referred to arbitration.

#### **DISPOSITION**

- 1. This Court lacks jurisdiction to hear and determine the dispute as canvassed in the underlying suit as canvassed in the plaint dated 4<sup>th</sup> June, 2019.**
- 2. The instant proceedings are stayed and the dispute is referred to Arbitration under Clause 40 of Articles of Association of the Company.**
- 3. The Preliminary Objection is upheld with costs to the Defendants /Applicants.**

**DATED, SIGNED & DELIVERED IN OPEN COURT ON THIS 13 TH DAY OF MARCH 2020.**

**M. W. MUIGAI**

**JUDGE**

**IN THE PRESENCE OF:**

**NO APPEARANCE FOR THE PLAINTIFFS**

**NO APPEARANCE FOR THE DEFENDANTS**

**COURT ASSISTANT - TUPET**